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We are inclined to think that no decision within recent months has more interest to the profession and to the general public than that of *Ford v. Chicago Milk Shippers' Association* in which the Supreme Court of Illinois give effect to the combination or "trust" law of that State. That statute enacted in 1891 entitled "An act to provide for the punishment of persons, copartnerships and corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases," provided that any corporation, partnership, individual or association of persons who shall create, enter into, become a member of, or a party to, any pool, trust, agreement, combination or confederation with another corporation, partnership, association or individual to regulate or fix the price of any article of merchandise or commodity, or to limit or fix the amount or quantity to be produced or sold, is made a misdemeanor punishable as provided in the act. By the sixth section of the act any purchaser of any article or commodity from an individual or corporation transacting business contrary to the provisions of the act shall not be liable for the price or payment of such article or commodity and may plead the act as a defense to any suit for the price.

It appeared in the case alluded to that the Chicago Milk Shippers' Association, brought an action of *assumpsit* against appellants to recover for milk sold and delivered. The declaration contained the common counts, to which was pleaded the general issue, and two special pleas which substantially alleged that the plaintiff was a corporation organized and created for the purpose of regulating and fixing the price, amount and quantity of milk to be shipped and sold within the limits of Chicago to the city dealers and retail dealers, and pursuant to its purpose to become a party to an agreement, undertaking, combination and confederation with certain persons named, and others, to regulate and fix the

price, quantity and quality of milk to be shipped and sold within the limits of Chicago and in pursuance of that agreement plaintiff sold and delivered to the defendant, a retail milk dealer, quantities of milk at the price fixed and determined by the plaintiff and other persons in pursuance of such agreement. It was held by the court that it was a combination in restraint of trade and that plaintiff could not recover. The court construed the statute and held that as a general rule no recovery can be had upon a contract made in violation of the express provisions of a public statute. Where an act is forbidden by the statute, no right arises under any agreement made in carrying out such forbidden act, as no legal right arises to do that which is declared illegal, and in the absence of a legal right there can be no legal remedy. It was apparent that the object of the association is to control the price of the purchase and sale of milk to retail dealers within the limits of Chicago, and such object is in violation of the act of 1891, and the corporation as well as its managers, may be found guilty for such violation. They also hold that the statute making a combination, trust or agreement between corporations, partnerships, associations or individuals, to fix the price of any article of merchandise, or to limit the amount sold, an offense, is valid; that a corporation as an entity may not be able to create a trust or combination with itself, but its individual shareholders may, in controlling it, together with it, create such trust or combination, that will constitute it, with them, alike guilty; that corporations created within that State are amenable to the police power, and such bodies are not beyond legislative control, and are amenable to the same extent as natural persons.

A decision in favor of the validity of the income tax law is the result of the first application made for relief from its provisions. This decision has been rendered by Judge Hagner, in a Circuit Court of the District of Columbia, upon the application of a citizen of New York for an injunction against the Commissioner of Internal Revenue, mention of which we made in a recent issue (40 Cent. L. J. 1). The judge held the act was not unconstitutional as imposing

an unjust discrimination, because it did not discriminate between the different persons who were authorized to avail themselves of the \$4,000 exemption, and he decided that the courts were without authority to grant an injunction, because of the provision in the Revised Statutes that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. Upon one or two points, such as the taxation of aliens and of State instrumentalities and agencies under the act, the judge held that the complainant did not show any interest entitling him to relief, though he nevertheless decided adversely to the complainant's contention on several grounds. The case may be brought up again upon an amended bill, and in any event it will be appealed to the court of last resort.

NOTES OF RECENT DECISIONS.

LIMITATIONS OF ACTIONS—NEW PROMISE.—When a debt is barred by the statute of limitations and a new promise is conditional, suit cannot be maintained thereon, without showing a performance or fulfillment of the condition. This rule is clearly understood, but confusion frequently arises through mistaken notions of the effect of a qualified promise. The new promise, and not the old debt, is the measure of the creditor's right. If the debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debt or promise to pay the old debt when he is able, or by installments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him. And there are numerous cases of promise to pay a part of the debt barred by the statute, or pay in specific articles of property, in which, the promise not having been accepted according to its terms, it has been held that it did not operate to remove the bar of the statute. An exhaustive collection of cases upon these several features of a new promise will be found in the opinion of the Supreme Court of Rhode Island, deciding the case of Wiley v. Brown (30 Atl. Rep. 464), and wherein it was held that a

promise to pay in installments, a debt barred by the statute, does not remove the bar so as to enable the creditor to immediately sue thereon. A promise to pay in installments is a qualified promise, hence suit cannot be maintained until a breach of the promise has occurred.

EXTRADITION PROCEEDINGS — EXAMINATION OF EVIDENCE OF CRIME—HABEAS CORPUS.—The Supreme Court of Nebraska in *In re Van Seeiver*, 60 N. W. Rep. 1037, decide some interesting questions of practice regard extradition proceedings. They hold that where a requisition is made upon the governor of one State by the governor of another State for the return of an alleged fugitive from justice, and the requisition is accompanied by a copy of the complaint filed in the court to which the party whose return is demanded was held to appear by the examining magistrate, and also a copy of the evidence adduced at the preliminary hearing before the magistrate, and, on being arrested under a warrant issued by the governor in compliance with the request of such requisition, the party sues out a writ of *habeas corpus* in the District Court, or before a judge thereof, and, to reverse the order of the District Court or judge denying the relief prayed for, brings the case to this court by petition in error, the evidence taken at the preliminary hearing will not be examined for the purpose of ascertaining whether it sustains a charge of crime alleged in the information, nor to determine whether it supports the finding of the examining court that there was a probable cause to believe that the party had committed the crime with which he was charged. They also decide that where a requisition is accompanied by a copy of an indictment found by a grand jury, the fact that an indictment has been found is at least *prima facie* evidence that the act charged is a crime, and is so regarded in the State where the act was done, and where the policy of prosecution by information has been established by law, and it appears from the record accompanying the requisition that the party whose rendition is asked has been accorded a preliminary examination, as a result of which he was held to appear and answer to the charge in a higher court, and has been duly charged with the crime in the higher

court, in an information filed therein, a copy of which is attached to the papers presented with the requisition to the governor, such information is of as high a grade, as a criminal pleading, as an indictment, and entitled to the same weight as evidence, and will be so considered.

MORTGAGE ON LEASEHOLD—VALIDITY—USE OF CHATTEL MORTGAGE FORM.—In *Cross v. Weare Commission Co.*, 38 N. E. Rep. 1038, before the Supreme Court of Illinois, a lessee who had erected on the leased land elevator buildings, which could not be removed without injury to them and to the freehold, and whose lease gave him no right to remove fixtures, gave a mortgage thereof, which, though in form a chattel mortgage, purported to "grant" and "convey" the elevator. It was held that the mortgage was valid as a mortgage on the leasehold estate, although it was realty, and that the fact that such mortgage spoke of the mortgaged property as "goods and chattels" does not estop the parties from asserting it to be realty, as against a subsequent judgment creditor, whose judgment was obtained after the mortgage was recorded, and who also had actual notice of it. They also decide that where land belonging to a firm is mortgaged by one of the partners to secure a firm debt, and the other partner tells the mortgagee that he has no interest in the land, he and the judgment creditors of the firm with notice are estopped to deny that the mortgage passed the entire title of the firm. Magruder, J., says in part:

There is no doubt that appellees made a mistake in using blank forms of chattel mortgages when they accepted their securities. It may be true that they made a mistake in not more definitely describing the mortgaged property as realty; but it is clear from the evidence that they intended to secure themselves by mortgages which should cover the property, whether it was realty or personalty. Whether the instruments are valid as chattel mortgages or not, they must have priority over appellant's execution, if they can be regarded as valid securities upon the property as realty, appellant having had both constructive and actual notice of them before the entry of his judgment.

The question then arises whether the mortgages contained such words as can be regarded as including within their meaning an interest in realty. It is not essential that the instrument of conveyance should follow any exact or prescribed form of words, provided the intention to convey is expressed. To make a conveyance valid, it is sufficient, in general, that there be parties able to contract and be contracted with, a proper subject-matter sufficiently described, a valid consideration, apt words of conveyance, and

an instrument of conveyance duly sealed and delivered. In a mortgage there should be a sufficient condition of defeasance, but this often rests in parol, instead of being expressed in the deed itself. The words of conveyance used in the mortgages in this case are, "grant, sell, convey and confirm." The use of the word "convey" is equivalent to a grant, at common law, and passes the title. It means a transfer of title from one person to another. The word "grant" is a generic term applicable to the transfer of all classes of real property. *Patterson v. Carneal's Heirs*, 3 A. K. Marsh. 618; *Lambert v. Smith*, 9 Or. 185. The mortgage describes the property as "the steam elevator," etc., "On the . . . railroad elevator lot," etc. The grant of the steam elevator carries with it, as a part of the grant, the land upon which the elevator is located, and all that is necessarily used in connection therewith. When property is granted, whatever is necessary to the enjoyment of the grant is impliedly conveyed, as an incident thereto. *Tucker v. City of Rockford*, 137 Ill. 123, 27 N. E. Rep. 74. The grant of a house, store, mill, or other building carries with it the land under the building, and around it, which is necessary for its enjoyment. *Rogers v. Snow*, 118 Mass. 118; *Trinity Church v. Boston*, *Id.* 164; *Allen v. Scott*, 21 Pick. 25. It has been held that a mortgage on a "grist and saw mill and gin, together with all the privileges and appurtenances belonging thereto," included two acres of land upon which the mill and gin were located, and which had always been used in connection therewith, and were necessary to the enjoyment thereof. *Kimbrell v. Rogers*, 90 Ala. 339, 7 South. Rep. 241; *Johnson v. Rayner*, 6 Gray. 107; *Baker v. Bessey*, 73 Me. 472; *Davis v. Handy*, 37 N. H. 65; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159. The leasehold interest of Druley Bros. was necessary to the full enjoyment of the elevator, and the language of the mortgage was broad enough to include it. There is nothing in the mortgage or leases to indicate that it was the intention of the parties to provide for a removal of the elevators from the leased ground. The *habendum* clause of the mortgage is, "To have and to hold the same unto the said Weare Commission Company, its successors, heirs, executors, administrators, and assigns, to its and their sole use forever." Courts will so construe a conveyance as to give effect to the intention of the parties, rather than defeat such an intention by strict technical construction of the form of conveyance adopted. "A deed that is intended and made to one purpose may inure to another, for, if it will not take effect in the way it is intended it may take effect in another way." *Russell v. Coffin*, 8 Pick. 143; *Pray v. Pierce*, 7 Mass. 381; *Emigrant Co. v. Clark*, 62 Iowa, 182, 17 N. W. Rep. 483. Courts are liberal in construing deeds so as to give them effect. "If they cannot operate as that species of conveyance indicated by the letter, they will generally be held to operate in some other form, so as to effectuate the object which, from the whole instrument and the circumstances and conditions of the title, the parties appear to have intended." *Thayer v. McGee*, 20 Mich. 195; *Bryan v. Bradley*, 16 Conn. 474.

It is claimed by appellant that appellees are estopped from asserting that the property mortgaged is not personalty because the mortgages were written upon printed blanks intended for use as chattel mortgages, and the property is referred to therein as "goods and chattels," and the instruments were acknowledged as chattel mortgages. It is true that many things ordinarily considered fixtures to the realty may become, to all intents and purposes, per-

sonal property, by agreement of all parties interested in both the realty and fixtures. *Jones, Chat. Mortg.* (4th Ed.) § 124. It is also true that the parties to such agreement may, under certain circumstances, be estopped from denying that the property treated by them as personalty is personalty. *Ballou v. Jones*, 37 Ill. 95; *Davis v. Taylor*, 41 Ill. 405. But, as a general rule, it must appear in such cases that the person making the improvement had the intention, at the time of so making it, that it should become a part of the realty. In many of the cases where a chattel mortgage has been given upon property affixed to the realty, and where the property described therein has been held to be personalty, the debt secured by the mortgage has been for the purchase price of the machine or other article attached, and the chattel mortgage has been executed before the article was affixed to the realty, or at about the time it was so affixed, or the agreement for security by chattel mortgage has been made before the affixing took place. In some of the cases the lease of the lessee making the improvement authorizes a removal of the property affixed. In other cases it appears that the article attached to the realty can be removed without injury to it or to the realty. *Sword v. Low*, 122 Ill. 487, 13 N. E. Rep. 826; *Jones, Chat. Mort.* (4th Ed.) §§ 125, 132; *Ford v. Cobb*, 20 N. Y. 344; *Trull v. Fuller*, 28 Me. 545; *Tyler, Fixt.* pp. 671, 673; *Ewell, Fixt.* p. 60; *Tift v. Horton*, 53 N. Y. 377; *Warner v. Kenning*, 25 Mich. 173; *Henkle v. Dillon*, 15 Or. 610, 17 Pac. Rep. 148; *Portman v. Goepfer*, 14 Ohio St. 558; *Sisson v. Hibbard*, 75 N. Y. 542. In such cases the agreement that the personalty attached to the realty shall continue to be personalty will prevail, as between the parties to the agreement. *Ewell, Fixt.* p. 68; *Dobschuetz v. Holliday*, 82 Ill. 371. But where a chattel mortgage is executed upon machinery or buildings or articles after they have been so affixed to the realty as to become a part of it, and where the lease or other instrument of title under which the mortgagor holds does not authorize a removal of the thing attached, and where such removal cannot be made without injury to the realty or to the fixture itself, the agreement of the parties will not have the effect of preserving the character of personalty in the things so affixed to the freehold. *Ewell, Fixt.* pp. 23, 24, 68, 69, 317, 318; *Jones, Chat. Mort.* §§ 130, 131. Where such conditions exist the case does not come within any exception of the rule that parties cannot, by their mere agreement, convert into personalty that which the law declares to be real estate. *Docking v. Frazell*, 34 Kan. 20, 7 Pac. Rep. 618. Here the chattel mortgages were executed long after the elevator had been constructed and the machinery had been placed in it,—that is, after the improvements had become a part of the realty; the leases to Druley Bros. granted no authority for the removal of the improvements erected by them; and a removal of the elevator plant could not have been made without injury to it and the realty. *Sword v. Low*, 122 Ill. 497, 13 N. E. Rep. 826. It is unnecessary to inquire whether or not Druley Bros., or the survivor of them, or the representatives of either, would be estopped from denying that the elevator plant was personalty, if this was a proceeding by appellees to foreclose their mortgages as chattel mortgages, because they and appellees claim that the mortgaged property is realty. And not only is this so, but appellant, claiming adversely to both of them, contends that the property levied upon under his judgment is realty. In cases where parties may agree among themselves to treat fixtures as personalty, their private agreement cannot change the

character of the property, so far as third persons are concerned. *Dobschuetz v. Holliday, supra*; *Rowand v. Anderson*, 33 Kan. 264, 6 Pac. Rep. 255; *Lacustride Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476; *Jenney v. Jackson*, 6 Ill. App. 33; 8 Am. & Eng. Enc. Law, p. 61, and cases cited in note. The language used by Mr. Justice Cooley in *Lyle v. Palmer*, 42 Mich. 314, 3 N. W. Rep. 921, is applicable here. In that case it was said: "The circuit judge finds that the machinery was personalty. This finding was no doubt based upon the fact that the parties so believed and considered it. This may generally be conclusive, but not always, and in this case it is clear the parties were mistaken. The machinery was especially adapted for use in connection with the real estate. It was put up for use, and actually used, with it, and was not severed from the realty in ownership. The fact that, in the mortgage, it was specially described, was unimportant." For the reasons stated, we are inclined to hold that the mortgages in this case were sufficient for the purpose of conveying the property described therein as realty, as against the levy made by appellant under his judgment.

WAREHOUSE COMPANIES — RECEIPT — AUTHORITY OF OFFICERS.—It is held by the Court of Appeals of New York in *Bank of New York v. American Dock Trust Co.*, that a by-law of a warehouse company authorizing an officer to sign warehouse receipts does not authorize him to sign a receipt for his own goods, and that statements by an officer of a warehouse company to whom money was loaned on a warehouse receipt signed by himself, as to his authority to sign the receipt, are not evidence against the company. The following is from the opinion of Peckham, J.:

The question of the liability of the defendant turns upon the construction given to the by-law or resolution above mentioned. Did it give authority to the president to sign receipts in his own case? I think that if the president had issued a receipt similar to the one in question, except that it acknowledged the receipt of cotton from some third person, although such named person had not in fact deposited any cotton, yet in such case the defendant would have been liable, because the president had general authority, under the by-law, to issue receipts for cotton deposited by third parties, and therefore when he issued a receipt where no cotton had been received, although it was a violation of his authority and of his duty, yet the defendant would be held responsible on account of such general authority to give receipts. This is upon the principle decided in *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 12 N. E. Rep. 433, and cases cited. That principle is that where an agent has been clothed by his principal with power to do an act, in case of the existence of some fact peculiarly within the knowledge of the agent, and where the doing of the act is in itself a representation of the existence of that fact, the principal is estopped from denying its existence, as against third parties dealing with the agent in good faith, and in reliance upon the representation. I also think that if the by-law clothed Mr. Stone, the president, with general authority to issue receipts to himself for cotton which he actually deposited, if with such author.

ity he issued a receipt where he had not in fact deposited any cotton, the defendant would be liable to respond to a *bona fide* holder for value of such receipt. These two propositions I do not understand the defendant to dispute, or at least he does not regard them as antagonistic to his argument.

We come, then, to the consideration of the proper construction of the by-law. In the light of the general rules of law upon the subject of principal and agent, we are of the opinion that the by-law or resolution in question ought not to be construed as clothing either the president or the treasurer with any authority to issue receipts to himself for cotton which in truth had been deposited by him. It is acknowledged principle of the law of agency that a general power or authority given to the agent to do an act in behalf of the principal does not extend to a case where it appears that the agent himself is the person interested on the other side. If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time. *Claffin v. Bank*, 25 N. Y. 293; *Pratt v. Insurance Co.*, 130 N. Y. 206-216, 29 N. E. Rep. 117; *Neuendorff v. Insurance Co.*, 69 N. Y. 389; *Manhattan Life Ins. Co. v. Forty-Second & G. St. Ferry R. Co.*, 139 N. Y. 146, 34 N. E. Rep. 776. The by-law is general in its terms, and could be fully carried out to its fair and legitimate purpose by excluding from its meaning the case of either officer acting in his own personal matter. The case of *Titus v. Turnpike Co.*, 61 N. Y. 237, is unlike this case. The learned chief commissioner points out in his opinion what the difference is between an agent acting in matters for a principal, in which he is himself the other party, and the mere act of an officer signing the scrip issued by a corporation, where he is himself the owner of such scrip. The by-law in that case provided that the scrip should be signed by both the president and the treasurer, and the president was, by the charter, necessarily a stockholder. The case was one in which such an officer either had to go without any evidence of his ownership of stock, except what the books might show, or else he was to be permitted to sign the scrip. Upon the special facts in that case, the decision held that the president and the treasurer had the right to sign the scrip owned by and issued to themselves. Nor is the case of *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. Rep. 316, an authority in point here. In that case it appeared that the cashier had power to draw drafts for his own use, or payable to his own order, upon the same terms that he had to draw a draft for a stranger, viz, upon payment to the bank of the amount of the draft. When the cashier issued such a draft, he was acting within the scope of his apparent authority, and the very act of the issuing the draft was a representation of the existence of the fact that the draft was paid for. And we also held for the reasons therein stated, that there was a difference in the case of bank or cashier's drafts from most other cases of agency. The difference between this case and those which have been cited by the plaintiff is that in the cited cases the terms of the authority given to the agent were such that the agent had power, upon the existence of a certain fact, to do the very act which was in question, whereas in this case we hold that, by the true construction of the terms of the authority given to the president, he had no power, in any case, to sign a receipt such as is now before us. We are therefore of

the opinion that upon the evidence, as presented to the trial court, the plaintiff made out no cause of action.

CRIMINAL LAW — HOMICIDE — AUTREFOIS ATTAINT.—The Supreme Court of Mississippi say in *Singleton v. State*, 16 South. Rep. 295, that it is no defense to a prosecution for murder that it was committed while accused was a convict under sentence of imprisonment for life for a previous murder the plea of *autrefois attaint* being obsolete. *Campbell, C. J.*, says:

The objection that the prisoner was not amenable for the murder committed while he was a convict under sentence to imprisonment for life for a former murder is without support in principle or practice, here or elsewhere, at the present time or in any former period of which we have any account. At a former day, in England, because of the attainder consequent on conviction of felony, the doctrine was that a plea of *autrefois attaint* was a bar to prosecution for another felony of the same grade, for the reason "that a second trial would be wholly superfluous. Where, therefore, any advantage either to public justice or private individuals, would arise from a second prosecution, the plea will not prevent it, as where . . . the punishment will be more severe," etc. 1 Chit. Cr. Law, 464; 4 Bl. Comm. 337; 2 Hole, P. C. ch. 32; 2 Hawk. P. C. ch. 36. The idea seemed to be that it was vain and useless to try a man already convicted, and to suffer the very same consequence as would follow a second conviction, but, if public justice could be served by a severer punishment, a more extensive forfeiture, or otherwise, the plea of former attainder was not good. Even when the plea was available as stated in England, it would not have been good in the state of case here presented, and the courts would have repudiated the monstrous proposition that one sentenced for life was privileged to kill his fellow-men with impunity. Long ago, the plea of former attainder, as spoken of, was abolished by statute in England. It never was recognized in this country, so far as can be learned, except in Tennessee, in 1827, as shown by the case *Crenshaw v. State*, Mart. & Y. 122, where it was held that a conviction, judgment, and execution upon one indictment for a felony not capital is a bar to all other indictments for felonies not capital committed previous to such conviction, judgment, and execution. Even that curious decision is not a precedent for the plea relied on in this case. In the remarkable opinion of Judge Catron in that case is an account of the case of one Stone, in England, who was hanged for murder, although he was attainted for felony, and invoked that as a protection in the trial for murder. So it may be confidently affirmed that no adjudged case and no statement by any text-book can be found to sustain the plea in this case. The plea of former attainder, as formerly known in England, has been expressly repudiated in some cases—*State v. McCarty*, 1 Bag. 334; *Hawkins v. State*, 1 Port. (Ala.) 475,—and generally understood not to be admissible in this country. It could not be for the reason that attainder, and corruption of blood, and the consequent forfeitures resulting from convictions under the common law do not exist in this country, and cannot, under the constitution; and therefore the supposed principles which sustained the plea of *autrefois attaint* can have no application with us, which strangely enough was

overlooked by the Tennessee court in the case cited. The learned author of Walker's American Law, a most valuable element any book, says: "There cannot be in this country such a plea as a former attain, because there cannot be attainder." Walk. Am. Law, 693. In several standard works on criminal law no allusion is made to former attain as a plea to an indictment. We have shown that under the common law the plea here relied on was unavailing, and that the common law as to former attain is not in force here. The question presented by the plea here is whether the sentence to imprisonment for life licenses the convict to murder with impunity, and surely all must agree to a negative to this question. The idea that because a convict is under many disabilities he cannot commit crime, as he has opportunity, without punishment, is untenable. If civilly dead, he is corporeally alive, is under the protection of the law, and answerable for what he does, just as if under no denial of civil rights, and so it has been expressly held in cases just like this. *State v. Connell*, 49 Mo 282; *Thomas v. People*, 67 N. Y. 218. If it had never been so held, we would reject the monstrous proposition of immunity to a convicted felon from punishment for his after crimes, and hold him amenable for them as if he had not been convicted.

WHAT INTERFERENCE IN THE PERFORMANCE OF CONTRACTS, BY PERSONS NOT PARTIES THERETO, IS ACTIONABLE?

I. *Contracts as to Property*.—As long as the individual does not wrongfully and unlawfully infringe upon the legal rights of others, or commit an offense against the public, he is entitled to the enjoyment of the fruits and advantages of his own enterprise, industry, skill and credit. In his possession of such rights he is entitled to be protected against the unlawful, wrongful and wanton interference, disturbance or annoyance of third persons.¹ But if such disturbance or loss come as a result of competition or the exercise of like rights by others, no action will lie.² That which is right and lawful for one man to do cannot furnish the foundation for an action in favor of another, even though damage may result from such act or acts, for it will be *damnum absque injuria*.³ It has been laid down by the courts, as a general

proposition, that the exercise of a legal right in a lawful manner cannot be affected by the motive which controls it;⁴ for a human tribunal can take no cognizance of inward feelings and intentions, which are not manifested by external conduct.⁵ And so long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart.⁶ It is the legal right of every *sui juris* person to have business relations with anyone with whom he can make contracts, and if he is wrongfully and unlawfully deprived of this right by others he is entitled to redress.⁷ He is entitled to the benefits of any such lawful contract. When A makes a binding promise to B, an obligation is created which remains in force until extinguished by its performance or discharge. It is clearly not within the scope of a contract to impose the burdens of an obligation upon one who is not a party thereto, nevertheless a contract does impose a duty, on such persons, not to wrongfully and unlawfully interfere with its due performance.⁸ There must be a wrongful or malicious intent to do harm to the plaintiff, or the use of unlawful means, before the right of action, for procuring a breach of contract, can be maintained.⁹ Malicious intent, as used here, is any unlawful act done willfully and purposely to the damage of another person.¹⁰ Mere knowledge of the fact that there is a subsisting contract is not sufficient to render such person liable. It is only with the above limitations that we can safely say that a contract can or does "impose a duty, upon persons extraneous to the obligation; not to interfere with its due performance."¹¹ It is a part of the common right of every one that he may go to any friend and in good

¹ Walker v. Cronin, 107 Mass. 555; Snow v. Wheeler, 113 Mass. 179.

² Walker v. Cronin, 107 Mass. 555.

³ Chatfield v. Wilson, 28 Vt. 49; Railroad Co. v. Carr, 38 Ohio St. 448; Chesley v. King, 74 Me. 164; Nat. Copper Co. v. Minn. Min. Co., 57 Mich. 83; Hamilton v. Vick-burg, etc. R. R. Co., 119 U. S. 280; Flint R. R. Co. v. Detroit, etc. R. R. Co., 31 N. W. Rep. 281; McMillen v. Staples, 36 Ia. 532.

⁴ Phelps v. Nowlen, 72 N. Y. 39; Kiff v. Youmans, 86 N. Y. 324; Pantan v. Hall, 17 Johns. 92; Brothers v. Morris, 49 Vt. 460; Mahan v. Brown, 13 Wend. 261; Clinton v. Myers, 46 N. Y. 511; Jenkins v. Fowler, 12 Harris, 308; Glendon Iron Co. v. Uhler, 75 Pa. St. 467; Roath v. Driscoll, 20 Conn. 533; Harswood v. Tompkins, 24 N. J. 425; Birkee v. Smith, 37 N. W. Rep. 838; Stevenson v. Newham, 13 C. B. 285; Floyd v. Baker, 12 Co. 23; Jenkins v. Williams, 115 Mass. 217.

⁵ Covanhoven v. Hart, 21 Pa. St. 495.

⁶ Jenkins v. Fowler, 24 Pa. St. 308.

⁷ Cooley on Torts, 278.

⁸ Lawson on Contracts, § 115.

⁹ Pollock on Torts, pp. 452-453; McCann v. Wolff, 28 Mo. App. 447.

¹⁰ Wheeler v. Nesbitt, 24 How. 545.

¹¹ Pollock on Torts, p. 453.

faith urge him to do this or that.¹² He is entitled to express his individual opinion, so long as it is not libelous or slanderous. Mr. Cooley, in his work on Torts, lays down this rule: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequences, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it."¹³ Thus, if A has agreed to sell property to B, C may at any time before the title has passed induce A not to let B have the property, and to sell it to himself, provided in so doing he be guilty of no fraud, or misrepresentation, without incurring any liability to B; A alone, in such case, must respond to B for the breach of his contract, and B has no claim upon, or relation with, C.¹⁴ But when such breach has been procured by threat, violence, fraud, falsehood or deception, it may be otherwise; as, for example, one were to personate a vendee of goods and receive and pay for them as on a sale to himself, the vendee would have his action against the vendor; and he might also pursue the parties who, by deceiving one, had defrauded both.¹⁵ The gist of the action against the party procuring the breach of the contract is not for the recovery of the goods, but for damages for the fraud in personating the vendee. The following example will show clearly the basis of the action in such cases: Suppose that A, knowing that B was about to bestow upon C, as a gratuity, a large amount of property, and A fraudulently personates C, and receives the property, C could have no action against B, for there was no contract relation between them; but C could have his action against A for his fraud.¹⁶ The means used to accomplish the wrong is in either case the same, showing conclusively that the fraud is the basis of the action. The breach of the contract thus induced only goes to the question of damages. The cases are too numerous to be reviewed at this time, where interference or disturbance with business or con-

tract relations through acts of violence, nuisance, threats, deceit, fraud or libel and slander have been redressed both in England and in this country.¹⁷ The next question we come to consider is, whether an action will lie against one who, from mere malicious motives without threats, violence, fraud, falsehood or deception, induces another to violate his contract with the plaintiff. Judge Coleridge, in dissenting from the opinion of the court in the well known English case of *Lumley v. Guy*,¹⁸ says: "The existence of intention, that is, malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, nor its hurtful consequences." This doctrine is sustained both on principle and by the weight of authority.¹⁹

In every binding contract the parties must be competent to contract, and do so freely, and it seems upon sound principles of logic that the natural and reasonable presumption is, that each party enters into the contract with his eyes open, and with the purpose and expectation of looking alone to the other for redress in case of breach. It is a truism of the law, that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. It is conceded by the authorities, that one may lawfully persuade another to break his contract with a third person "if it be done from good motives." It seems that this qualification has no place in the proposition. Suppose A, by fraudulent representations, induces B to sell him a large quantity of goods on credit, intending to defraud B of the entire value of the goods. C, knowing that the representations are false, and not caring whether B shall lose his goods or not, but of unmixed malice and illwill toward A, procures B to refuse to deliver the goods, by truthfully informing B of the falsity of the representations made by A. Would it not be a reproach upon the law to say that C is liable in an action brought by A?

II. *Contracts as to Personal Service.*—

We now come to the consideration of that part of the subject which relates to personal

¹² *Haywood v. Tillson*, 75 Me. 100; *U. S. v. Kane*, 25 Fed. Rep. 748.

¹³ *Cooley on Torts*, p. 497; *Kimball v. Harman*, 34 Md. 497; *Boyson v. Thorn*, 33 Pac. Rep. 492; *Chambers v. Baldwin*, 15 S. W. Rep. 57.

¹⁴ *Ashley v. Dixon*, 48 N. Y. 430.

¹⁵ *Green v. Button*, 2 C. M. & R. 707.

¹⁶ *Rice v. Manly*, 66 N. Y. 82; *Boyson v. Thorn*, 33 Pac. Rep. 492.

¹⁷ *Lally v. Cantwell*, 30 Mo. App. 524.

¹⁸ 2 E. & B. 216.

¹⁹ *Chambers v. Baldwin*, 15 S. W. Rep. 57; *Boyson v. Thorn*, 33 Pac. Rep. 492.

service. Upon principle of law and justice, it may be laid down as a part of every man's civil rights, that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice.²⁰ It is also his right to choose the department of labor in which he will engage, and to make his own contracts with whomsoever he may lawfully contract, and to enjoy the fruits of his own skill and enterprise.²¹ He may work or not, as he pleases, and he may put his own price upon his labor, and prescribe when and how he will perform it, and so long as he does not become a vagrant neither the public nor third persons can have any legal concern. Ordinarily a workman's time, labor and skill is his stock in trade, and he may lawfully dispose of and use it as he pleases, and no one can hinder or prevent him from so doing, nor has he the right to prescribe or dictate the terms upon which another shall work.

In the leading English case of *Lumley v. Guy*,²² extending the doctrine of the statute of laborers passed in 25 Edw. III., the court laid down the principle that an action will lie for maliciously inducing a servant to quit the services of his master. But the judge, in concluding, said: "Merely to induce or procure free a contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reason I have stated is not actionable." In the later English case of *Bowen v. Hall*,²³ following the above doctrine, Brett, J., said: "Merely to persuade a person to break his contract may not be wrongful in law or in fact." The same principle has been followed in most American decisions.²⁴ The servant need not be in actual service,²⁵ but there must be a binding obligation to perform service,²⁶ and it must be

shown that the person procuring the breach knew of such obligation.²⁷ Upon principle and by the weight of authority the doctrine is established that where one maliciously and wantonly induces another to discharge his servant, the fact that the term of service thus interrupted is not for a fixed period, nor the fact that there is no right of action against the person who is induced or influenced to terminate the service, is of itself no bar to an action against the person procuring such discharge.²⁸ It is a legal right of the party to such agreement to terminate or refuse to perform it, and in so doing he violates no right of the other party. But such wanton and malicious interference by a third person for the mere purpose of injuring another, is not the exercise of a legal right.

The law is now well settled that workmen may combine or associate together for their own mutual protection, or for the purpose of bettering their condition. The very genius of free institutions welcome them to higher plains and better fortunes. As long as they are free from engagement, and at liberty to exercise the option of entering into employment or not, they have a right to agree among themselves to insist upon receiving certain wages for their work, and may refuse to accept a lower price.²⁹ Both legislation and the course of judicial decision in England and America has been progressively in the direction of, according to laborers the enjoyment of equal rights with others, and today workmen stand upon the same broad level of equality before the law with all other vocations, professions or callings whatsoever, respecting the disposition of their labor and the advancement of their associated interests. In the relations existing between labor and capital, the attempt by co-operation on the one side to increase wages by diminishing competition, or on the other to increase the profits due to capital, is within certain limits lawful and proper,³⁰ but it ceases to be so

²⁰ Cooley on Torts, p. 278.

²¹ Wood on Master and Servant, § 241; Walker v. Cronin, 107 Mass. 555.

²² 2 E. & B. 216.

²³ 6 Q. B. Div. 333.

²⁴ Walker v. Cronin, 107 Mass. 555; Old Dominion S. S. Co. v. McKenna, 30 Fed. Rep. 48; Jones v. Blocker, 43 Ga. 331; Dickson v. Dickson, 33 La. Ann. 1261; Bixby v. Dunlap, 56 N. H. 456; Noice v. Brown, 29 N. J. L. 569; Haskins v. Royster, 16 Am. Rep. 471; Huff v. Watkins, 40 Am. Rep. 680.

²⁵ Lumley v. Guy, 2 E. & B. 216; Bowen v. Hall, 6 Q. B. Div. 333.

²⁶ Peters v. Lord, 18 Conn. 337; Butterfield v. Ashley, 2 Gray, 256; Caughey v. Smith, 47 N. Y. 244;

Campbell v. Cooper, 34 N. H. 49; Forbes v. Cochrane, 2 Barn. & C. 448; Sykes v. Dixon, 9 Ad. & E. 693.

²⁷ Lee v. West, 47 Ga. 311; Morgan v. Smith, 77 N. C. 37; Butterfield v. Ashley, 2 Gray, 256; Fores v. Wilson, Peake, 55.

²⁸ Lucke v. Clothing Cutters' & Trimmers' Assembly, 26 Atl. Rep. 505.

²⁹ Wood on Master and Servant, § 241; Com. v. Hunt, 4 Mete. 111; Carew v. Rutherford, 106 Mass. 110; Master Stevedores' Ass. v. Walsh, 2 Daly, 1.

³⁰ Snow v. Wheeler, 113 Mass. 179.

whenever unlawful coercion or intimidation is employed to control the freedom of the individual in disposing of his capital or labor.³¹ Every attempt, by force, threat or intimidation to deter or control an employer in the determination of whom he will employ, or what wages he will pay, is an act of wrong and oppression; and any and every combination for such purpose is an unlawful conspiracy.³² It is the duty of the State to protect the individual citizen against the combined power of numbers, to wrongfully injure him in his legitimate business pursuits.³³ All combinations and associations designed to interfere with, obstruct, vex or annoy workmen in their occupation, or in obtaining work; or to dictate in any particular the terms upon which an employer shall conduct his business, by means of threats of injury or loss; by interference with his property or traffic, or with his lawful employment of other persons, or design to abridge any of his lawful rights, are *pro tanto* illegal combinations; and all acts done in furtherance of such intentions by such means and accompanied with damage, are actionable.³⁴ A combination to procure or compel a common carrier corporation, subject to the provisions of the interstate commerce act, to refuse to receive, handle and haul interstate freight from another like common carrier, in order to injure the latter, is an unlawful combination or conspiracy, and if damage result an action may be maintained against all who were engaged in the conspiracy. An injunction, either prohibitory or mandatory, will be issued against the leader of such conspiracy to prevent damages which might result from such unlawful acts.³⁵ The public has such an interest in all *quasi* public corporations as to warrant a court of equity in taking juris-

diction in all such cases where irreparable damage is threatened. What one man may lawfully do single, two or more may lawfully agree to do jointly. The number who unite to do an act cannot change its character from lawful to unlawful.³⁶ We have seen that every unlawful overt act committed by any person or combination of persons is actionable. But the anathemas of secret organizations of men combined for the purpose of controlling the industry of others by a species of intimidations that work upon the mind, rather than the body, are quite as dangerous, and generally more effective than acts of actual violence. That evils exist in the relations of capital and labor, and that workmen have grievances that oftentimes call for relief, are facts that observing men cannot deny, but the remedy cannot be found in secret conspiracies nor in the boycott.³⁷ In the popular acceptations of the term "boycott," it is an organized effort to exclude a person from business relations with others, by persuasion, intimidation and other acts which tend to violence, and thereby coerce him to submit to dictation in the management of his affairs.³⁸ The word "boycott" is in itself a threat. Strikes, boycotting and picketing are now by statute in most of the States made unlawful.³⁹ An injunction will lie to restrain individuals, labor unions and members thereof from attempting by force, menaces, threats or from entering upon property to prevent workmen from working on such terms as they may agree on with the employer;⁴⁰ and also to prevent the instigation of a boycott or displaying banners for the purpose of intimidating employers to secure the discharge of workmen, or to deter the laborers from their work.⁴¹ As a general proposition equity will interfere in the transactions of men, by preventive measures, only

³¹ State v. Stewart, 9 Atl. Rep. 559; Snow v. Wheeler, 113 Mass. 179.

³² Crump v. Com., 6 S. E. Rep. 620.

³³ Reg. v. Duffield, 5 Cox C. C. 432; Ray on Contractual Limitations, p. 336; State v. Rowley, 12 Conn. 112; State v. Glidden, 55 Conn. 46.

³⁴ Old Dom. S. S. Co. v. McKenna, 30 Fed. Rep. 48; Johnston Harvester Co. v. Meinhardt, 60 How. Pr. 168; Slaughter-House Cases, 83 U. S. 16; Parleton v. McGrawley, Peake, 205; State v. Norton, 23 N. J. L. 44; State v. Donaldson, 32 N. J. L. 155; Rafael v. Verelst, 2 W. Bl. 1055; Gregory v. Brunswick, 6 Man. & G. 205; Gunter v. Aster, 4 Moore, 12; Bowen v. Matheson, 14 Allen, 499; Reg. v. Rowlands, 5 Cox Crim. Cases, 436.

³⁵ Toledo, A. A. & N. M. Ry. Co. v. The Pa. Co., 29 Wk. L. B. 233.

³⁶ Bowen v. Matheson, 14 Allen, 499; Steamship Co. v. McGregor, 23 Q. B. Div. 598; Parker v. Huntington, 2 Gray, 124; Wellington v. Small, 3 Cush. 145; Payne v. Ry. Co., 13 Lea, 507.

³⁷ State v. Stewart, 59 Vt. 273.

³⁸ Brace v. Evans, 13 Ry. & Corp. L. J. 561; Crump v. Com., 84 Va. 927; State v. Glidden, 55 Conn. 46; Mogul Steamship Co. v. McGregor, L. R., 15 Q. B. Div. 476.

³⁹ Ray on Contractual Limitations, § 75.

⁴⁰ Murdock v. Waker, 25 Atl. Rep. 492; Consolidated Min. Co. v. Miners' Union, Wardner, 51 Fed. Rep. 260.

⁴¹ Sherry v. Perkins, 147 Mass. 212; Casey v. Cin. Typ. Union, 45 Fed. Rep. 135; Toledo, A. A. & N. M. Ry. Co. v. The Pa. Co., 29 Wk. L. B. 233.

when irreparable damage is threatened and the law does not afford an adequate remedy for the contemplated wrong.⁴²

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⁴² McHenry v. Jewett, 90 N. Y. 62.

CONTRACT — OFFER AND ACCEPTANCE— NECESSITY OF FORMAL WRITING.

SANDERS V. POTTITZER BROS.' FRUIT CO.

Court of Appeals of New York, December 18, 1894.

Where parties have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on one side and accepted on the other, with an understanding that the agreement shall be reduced to a formal writing, the contract is complete, though no formal writing is ever executed. Earl, Gray, and Bartlett, JJ., dissenting.

O'BRIEN, J.: The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee, and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made, so as to become binding upon the parties. On the 28th of October, 1891, the plaintiffs submitted to the defendant the following proposition in writing: "Buffalo, N. Y., Oct. 28, 1891. Messrs. Pottlitzer Bros.' Fruit Co., Lafayette, Ind.—Gentlemen: We offer you ten car loads of apples, to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one-half green fruit, balance red fruit, to be shipped as follows: First car between 1st and 15th December, 1891; second car between 15th and 30th December, 1891; and one car each ten days after January 1, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either way, at the price of \$2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigerator cars; this proposition to be accepted not later than the 31st inst., and you to pay us \$500 upon acceptance of the proposition, to be deducted from the purchase price of apples at the rate of \$100 per car on the last five cars. Yours respectfully, J. Sanders & Son." To this proposition the defendant replied by telegraph on October 31st as follows: "Lafayette, Ind., 31st October. J. Sanders & Son: We accept your proposition on apples, provided you will change it to read car every eight days from January first, none in December; wire acceptance. Pottlitzer Bros.' Fruit Co." On the same day the plaintiffs replied to this dispatch, to the effect that they could not accept the modification proposed,

but must insist upon the original offer. On the same day the defendant answered the plaintiffs' telegram as follows: "Can only accept condition as stated in last message. Only way we can accept. Answer if accepted. Mail contract, and we will then forward draft. Pottlitzer Bros.' Fruit Co." The matter thus rested till November 4th, when the plaintiffs received the following letter from the defendant: "Lafayette, Ind., November 2, 1891. J. Sanders & Son, Stafford, N. Y.—Gents: We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples, still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sale of apples in December, and therefore we do not think it advisable to take the contract, unless you made it read for shipment from the 1st of January. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring. If you can change the contract so as to read as we wired you, we will accept it, and forward you draft in payment on same. Pottlitzer Fruit Co." On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph: "November 4th. Pottlitzer Brothers Fruit Company, Lafayette, Ind.: Letter received. Will accept conditions. If satisfactory, answer, and will forward contract. J. Sanders & Son." The defendant replied to this message by telegraph, saying: "All right. Send contract as stated in our message."

The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant's telegram above set forth, and which was acceded to by the plaintiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were: (1) That the fruit should be well protected from frost and well hayed; (2) that if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars; (3) that the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome, and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence, and, I think, cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end, and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence, but it is not material to the question presented by the appeal. The writings and telegrams that passed between the parties contain all the elements of a complete

contract. Nothing was wanting in the plaintiffs' original proposition but the defendant's assent to it, in order to constitute a contract binding upon both parties according to its terms. This assent was given upon conditions that a certain specified modification was accepted. The plaintiffs finally assented to the modification, and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions, not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition, as originally made, and the subsequent letters and telegrams; and, if they constituted a contract of themselves, the absence of the formal agreement contemplated was not, under the circumstances, material. When the parties intend that a mere verbal agreement shall be finally reduced to writing, as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties, by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. *Vassar v. Camp*, 11 N. Y. 441; *Brown v. Norton*, 50 Hun. 248, 2 N. Y. Supp. 869; *Pratt v. Railroad Co.*, 21 N. Y. 308. The principle that governs in such cases was clearly stated by Judge Selden in the case last cited, in these words: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party, and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties,—this is an obliga-

tory contract, which neither party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met, through the correspondence, upon all the terms, as well as the subject-matter, of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations, or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it, any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition, and the defendant accepted without any such conditions as it subsequently sought to attach it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever. The principle, therefore, which is involved in the case, is this: Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if, at the close of the correspondence, the plaintiffs became bound by their offer, and the defendant by its ac-

ceptance of that offer, whether the final writing was signed or not, as I think it was, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of confusion and uncertainty into the law of contract. If the parties did not become bound in this case, they cannot be bound in any case. The judgment should be reversed, and a new trial granted; costs to abide the event. All concur, except Earl, Gray, and Bartlett, JJ., dissenting. Judgment reversed.

NOTE.—The conclusion of the majority of the court in the principal case, at first blush, does not appear to be in line with the authorities, though full justification therefor may be found in the statement of the facts. Undoubtedly the merits of the controversy called strongly upon the court to take the ground stated. It abundantly appeared that the minds of the parties had met upon an arrangement which was full as to details and thoroughly complete in substance, and that the defendants thereafter changed their minds and endeavored to back out. The court holds that a stipulation to reduce a valid contract to some other form does not affect its validity, and that such stipulation may not be used by either of the parties for the purpose of imposing upon the other additional burdens or obligations, or of evading the performance of any of the provisions of the contract.

The law upon this subject may be thus stated: Though the parties are in fact agreed upon the terms—in other words, though there has been a proposal sufficiently accepted to satisfy the general rule—yet they do not mean the agreement to be binding in law till it is put into writing or into a formal writing, if such be the understanding between them, they are not to be sooner bound against both their wills. Pollock on Contracts, Ed. 1888, p. 115; Chinnock v. Marchioness of Ely, 4 D. J. S. 638; Water Commissioner v. Brown, 32 N. J. L. 504; Eads v. City of Carondelet, 42 Mo. 117; Morrill v. Tehama Co., 10 Nev. 125; Congdon v. Davey, 46 Vt. 478; Fredericks v. Fasnacht, 30 La. Ann. Pt. 1, 117; Browne v. Shapleigh, 9 Mo. App. 64; Hough v. Brown, 19 N. Y. 111. Whether such is in truth the understanding is a question which depends on the circumstances of each particular case. Rossiter v. Miller, 3 App. Cas. 1124, 1152. It is not to be supposed that because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made. Blaney v. Hoke, 14 Ohio St. 292; Montague v. Weil, 30 La. Ann. 150; Pratt v. Railroad Co., 21 N. Y. 305; Bell v. Offutt, 10 Bush (Ky.), 632; Mackey v. Mackey, 29 Gratt. (Va.) 158; Cheney v. Eastern Trans. Line, 59 Md. 557; Paige v. Fullerton Woolen Co., 27 Vt. 485. But the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement. Ridgeway v. Wharton, 6 H. L. C. 238, 264, 268, per Lord Cranworth, C., and see per Lord Wensleydale at pp. 305 306; Lyman v. Robinson, 14 Allen (Mass.), 242; Brown v. Railroad Co., 4 N. Y. 479; Methudy v. Ross, 10 Mo. App. 101. Still more is this the case if the first record of the terms agreed upon

is in so many words expressed to be "subject to the preparation and approval of a formal contract." Winn v. Bull, 7 Ch. Div. 29. It is also settled law that a contract may be made by letters and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain. Bonnell v. Jenkins, 8 Chan. Div. 70.

The decision of the principal case, it will be noted, is by a bare majority of the court, and no dissenting opinion was filed. In the absence of any knowledge on the subject we are left to infer that the dissenting judges reasoned that, as when a formal written contract has been executed the policy of the law requires that all previous utterances or communications shall be deemed to have been merged in it, and the instrument itself shall be accepted as the only evidence of the agreement, negotiating parties should be allowed, when a formal contract is mutually contemplated, to rely upon not committing themselves by anything short of such ultimate formality.

JETSAM AND FLOTSAM.

INTERFERENCE BY STRIKERS WITH INTERSTATE COMMERCE.

The right of the federal government, through the United States courts, to enjoin interference with interstate commerce has once more been affirmed by the decision at St. Louis a fortnight ago in the case before the Circuit Court on demurrer to the government's petition for an injunction against Debs and the American Railway Union. Judge Phillips followed the lines of Justice Harlan's decision in the Northern Pacific matter, wherein the employees of that company appealed from Judge Jenkin's sweeping injunction. The principal point of the latter opinion is to reinforce that part of the other which permits United States courts to enjoin, in advance of any actual outbreak, all combinations or conspiracies on the part of railway employees which have for their object the stoppage of trains, no matter what the grievance. The court also permits injunctions, enforceable by all the power of the federal government, against interference with interstate commerce or the running of trains on the part of strikers or ruffians after a strike has been declared for legitimate reasons. Evidently we have, within a short time, advanced rapidly towards a solution of the legal status of strikes and strikers. Our late legislation against trusts and combinations, according to these decisions, applies to employees as well as to corporations—which seems to agree with natural justice.—*Albany Law Journal*.

MAY DIRECTORS BE ELECTED WITHOUT OWNING STOCK?

The Alabama statute requires that the directors of a corporation shall hold and own, in good faith and in their own right, shares of the capital stock of a company. The question, often mooted and variously decided, whether ownership of stock (registered otherwise) shall precede the election, or the action of the director after election, received a brief discussion in *Greenough v. Alabama Great Southern R. Co.*, 64 Fed. Rep. 22. The court (Pardee, C. J.) held that the spirit and policy of the law requires that the affairs of a corporation be controlled and managed by agents who have a pecuniary interest in the corporation. Under this statute, the qualifications of a director are that he be elected by the stockholders and own and

hold shares. When the stock is owned by one person, and owned by another, and owned by a third, and owned by a fourth, and owned by a fifth, and owned by a sixth, and owned by a seventh, and owned by an eighth, and owned by a ninth, and owned by a tenth, and owned by an eleventh, and owned by a twelfth, and owned by a thirteenth, and owned by a fourteenth, and owned by a fifteenth, and owned by a sixteenth, and owned by a seventeenth, and owned by an eighteenth, and owned by a nineteenth, and owned by a twentieth, and owned by a twenty-first, and owned by a twenty-second, and owned by a twenty-third, and owned by a twenty-fourth, and owned by a twenty-fifth, and owned by a twenty-sixth, and owned by a twenty-seventh, and owned by a twenty-eighth, and owned by a twenty-ninth, and owned by a thirtieth, and owned by a thirty-first, and owned by a thirty-second, and owned by a thirty-third, and owned by a thirty-fourth, and owned by a thirty-fifth, and owned by a thirty-sixth, and owned by a 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hold shares of stock in good faith and in his own right. When the election as a director, and the ownership of stock combine in one person, he is eligible as a managing director. The law is satisfied if both election and ownership precede action as a director. There are decisions of respectable courts and judges that apparently conflict with this view, but the following well considered cases are supported by common sense and the course of business: *Mozley v. Alston*, Phil. Ch. 790; *State v. McDaniel*, 22 Ohio St. 354; *Wight v. R. Co.*, 117 Mass. 226; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; *Brown's Case*, 9 Ch. App. 102; *Parmelee v. Hambleton*, 24 Ill. 609; *State v. Murray*, 28 Wis. 96; *Privett v. Bickford*, 26 Kan. 52. —*National Corporation Reporter*.

THE EIGHT HOUR LAW.

In these days when paternalism and socialism in legislation find so many advocates and supporters, the case of *Low v. Rees Printing Company*, 59 N. W. Rep. 362, decided by the Supreme Court of Nebraska, on June 6th, is instructive. The case involved the constitutionality of sections 1 and 3 of Chapter 54 of the Session Laws of 1891. These sections provided, in effect, that for all classes of mechanics, servants and laborers, excepting those engaged in farm and domestic labor, a day's work should not exceed eight hours, and that for working any employee over the prescribed time the employer should pay extra compensation, in increasing geometrical progression, for the excess over eight hours. In a careful opinion, in which the authorities were exhaustively reviewed, the court decided that the act in question was unconstitutional; because, first, in discriminating against farm and domestic laborers the legislation was special, and was thereby in conflict with section 15, article 3, of the constitution, which provides that "in all cases where a general law can be made applicable, no special law shall be enacted," and, second, the constitutional rights of parties to contract with reference to compensation for services is denied. The court disposed of the argument that the act was a police regulation, by observing that "under pretense of the exercise of that power the legislature cannot prohibit harmless acts, which do not concern the health, safety, and welfare of society." —*Yale Law Journal*.

BOOK REVIEWS.

AMERICAN CASES ON CONTRACT.

Though especially prepared for the use of students this volume will be of value also to practitioners. It contains arranged in accordance with the analysis of Anson on Contracts, the leading American Cases on that subject. Its compilers Earnest W. Huffcut and Edwin H. Woodruff are Professors of Law at Cornell and Leland Stanford University. The selection of cases is very good. It is a volume of seven hundred pages. Published by Banks & Brothers. New York.

WILLIAMS ON REAL PROPERTY.

This seventeenth "International copyright" Edition of a work which first appeared in 1845 has been prepared by Harry B. Hutchins, professor of law in Cornell University, with American notes for use in this country. Though originally intended as a first book for the use of students in conveyancing, it has always been considered a convenient and valuable book of

reference to the practitioner. In England it is the leading text book on the subject. Its use and value has been heretofore more or less restricted in this country by reason of the divergence between the law of the two countries governing modern conveyancing. The addition of the American notes to this edition, however, will prove of great value to the American practitioner, giving him in concise shape and form the common law as controlled and restricted by statute. The notes are well prepared and exhaustive of the cases. It is a book of over eight hundred pages, admirably arranged, well printed, and with a good index. Published by The Boston Book Company, Boston, Mass.

UNDERHILL ON EVIDENCE.

The primary purpose of the author in the preparation of this work is, as he says in his preface, "to present in a concise and clear narrative a reasonably comprehensive statement of the rules and principles of the existing law of evidence, for the use of students of law pursuing their studies in law schools or elsewhere." Having in mind its use also by the profession, he has made a full citation of the most recent and important cases, which, with a carefully prepared topical and analytical index, will, it is believed, facilitate the convenient use of the book in many, if not in all, the exigencies of practice. We have made careful examination of the work and are favorably impressed with the results of the author's work, which is manifestly of a high order. His style and arrangement is excellent. The citation of authorities full and abundant. There is evidence throughout of good judgment, careful study, and conscientious research. We have no doubt that the book will take its place among the valuable treatises and be regarded as a controlling authority upon the law and rules of evidence. It is concisely written, being in one volume of about seven hundred pages. Published by T. H. Flood & Co. Chicago.

WORKS ON JURISDICTION OF COURTS.

This volume treats of the jurisdiction of the courts of the present day, how such jurisdiction is conferred and the means of acquiring and losing it. It first discusses the general principles affecting jurisdiction, in all classes of cases, follows this by a full discussion of the means of acquiring and losing jurisdiction, including the issuance and service of process, and then takes up separately the different classes of cases, writs and proceedings involving questions peculiar to themselves. The leading chapters in the book are on General Principles Affecting Jurisdiction, the Means of Acquiring Jurisdictions, Common Law, Equity, and Statutory Jurisdiction. The author is a practicing attorney of considerable reputation and was formerly one of the justices of the Supreme Court of the State of California, and is also the author of "Indiana Pleading and Practice," and of "Removal of Causes from State to Federal Courts." We have given the book searching examination and do not hesitate to indorse it as accurate, exhaustive and a valuable addition to legal literature. It is terse and concise in language, well arrayed as to subjects, logical in treatment. In short, it is an admirable book upon a most important and intricate branch of the law. Published by The Robert Clarke Company, Cincinnati, Ohio.

HUMORS OF THE LAW.

Mr. Jurydodger—"Your Honor, I feel that I am not fit to be a jurymen."

Judge—"You appear to me to be unusually intelligent, sir."

Jurydodger—"But, your Honor, I can't make head or tail out of what those lawyers say."

Judge—"Neither can I; take your seat in the jury-box."

The question of wills has its humorous side, as witness the following instance. The members of a certain family, upon the death of their father, had gathered together to listen to the reading of his will. Several legacies were read out, and each recipient, as he was made aware of his good fortune, burst into tears and expressed a filial wish that his father might have lived to enjoy his fortune himself. Finally, there came this bequest: "I give to my eldest son Tom a shilling to buy him a rope to hang himself." Tom, not to be outdone in filial feeling by his brothers, sobbed out, "God grant that my poor father had lived to enjoy it himself."—*Greenbag*.

A good story is told of an English lawyer, who, having succeeded in making a litigant of every farmer in his county, having grown rich at their expense, and thus established a valid claim to their consideration, consented to sit for his portrait, which was to adorn the court room of the county town. The picture was duly painted by a London artist, and previously to being hung was submitted to a private view. "Most uncommon like you to be sure," was the general verdict. But one old chap, regarding the canvass critically, dissented from the prevailing opinion, as follows: "That be somewhat like his face, but it aint the man;—this man has got his hand in his own pocket, you see; now I have knowed him for five and thirty years, and all that time he's had his hand in somebody else's pocket. This chap aint him."

WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCORD AND SATISFACTION — Ratification.—Where plaintiff agreed to a settlement of a claim for injuries while in a condition of physical pain which rendered the agreement voidable, and there was no evidence that the agreement was procured by fraud, an acceptance of the amount of such settlement by her attorney with her consent, at a time when she fully understood what she was doing, is a ratification of the settlement.—*DROHAN V. LAKE SHORE & M. S. RY. CO., Mass., 39 N. E. Rep. 1116.*

2. ADMINISTRATOR — Assignment of Mortgage to.—The fact that a mortgage was assigned by an administrator, in his official capacity, to himself, as an individual, through the medium of a third person, is not ground of defense in a suit by the administrator, in individually, to foreclose the mortgage.—*READ V. KNEEL, N. Y., 39 N. E. Rep. 4.*

3. APPEALABLE ORDER.—An order sustaining a demurrer to evidence is not appealable.—*THOMAS V. CHICAGO & L. E. RY. CO., Ind., 39 N. E. Rep. 44.*

4. APPEAL — Error—Appointment of Receiver.—In an action by a creditor of a corporation against it and its stockholders to have a receiver appointed, the liability of the stockholders enforced, and the corporation dissolved, an order appointing a receiver, but not determining the liabilities of the stockholders or dissolving the corporation, is not reviewable by writ of error, it not being a final order.—*CHICAGO STEEL WORKS V. ILLINOIS STEEL CO., Ill., 38 N. E. Rep. 1033.*

5. APPEAL — Evidence.—As evidence can be brought into the record only by bill of exceptions, the fact that the manuscript of the official reporter was included in the transcript does not make the evidence part of the record.—*HUGHES V. HUGHES, Ind., 39 N. E. Rep. 45.*

6. APPEAL—Notice—Limitation.—Under Rev. St. 1894, § 645 (Rev. St. 1891, § 633), limiting the time within which appeals may be taken to one year from the rendition of the judgment, an appeal must be fully perfected by filing a transcript and by giving notice to appellee within that time.—*COBURN V. WHITAKER & GARRETT LUMBER CO., Ind., 38 N. E. Rep. 1094.*

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—An assignment for the benefit of creditors is not made void by the failure of the assignee to qualify.—*SABIN V. LEBENBAUM, Oreg., 38 Pac. Rep. 434.*

8. ASSUMPSIT.—An action will lie against an estate on a quantum meruit for the reasonable value of services performed for deceased, on an express or implied promise by him to provide compensation therefor in his will, and a failure to do so.—*SNOWDEN V. CLEMONS, Colo., 38 Pac. Rep. 475.*

9. ATTACHMENT—Conflicting Levies.—Certain property was held by an officer under attachment, and a subsequent attachment was levied by defendant constable, who agreed with said officer to place it in possession to hold for both under their writs. Subsequently other attachments were levied by plaintiff constable on said property, and he also authorized it to hold for him under his writs. Afterwards the first

attachment suit was settled and dismissed, but J continued to hold for defendant and plaintiff: Held, that defendant, by J, was rightfully in possession of said property under his writ. — *FLANAGAN v. NEWMAN*, Colo., 38 Pac. Rep. 431.

10. ATTACHMENT—Dissolution.—Where a judgment creditor has levied upon personal property subject to the attachment of another party, he is entitled to come into court and move to discharge the property from the attachment, if the writ has been improvidently or improperly obtained. — *BANK OF SANTA FE v. HASKELL COUNTY BANK*, Kan., 38 Pac. Rep. 485.

11. ATTACHMENT—Sale Pending Appeal.—A return to an order of a justice of the Supreme Court to show cause why the sale of attached property under an order of the Circuit Court should not be enjoined pending an appeal, which shows that the property consists of horses, whose keep for 100 days will exceed their value, is sufficient, and the order will be discharged. — *SOUTHERN RY. CO. v. SHEPPARD*, S. Car., 20 S. E. Rep. 481.

12. ATTACHMENT—Satisfaction by Sheriff.—The act of a sheriff in attempting to release, by marginal satisfaction, an attachment levied on real property, is void, and a subsequent purchaser takes the property subject to the attachment. — *BARTON v. CONTINENTAL OIL CO.*, Colo., 38 Pac. Rep. 432.

13. BILL OF EXCEPTIONS—Sufficiency.—An indorsement on the margin of the bill of exceptions, signed by the judge, and stating the time when the bill was presented, is not a compliance with Rev. St. 1894, § 641 (Rev. St. 1891, § 629), which provides that "the date of the presentation shall be stated in the bill of exceptions." — *MILLER v. BLUE*, Ind., 39 N. E. Rep. 1097.

14. CARRIER—Passenger — Alighting from Moving Train.—The mere fact that a train fails to stop, as is its duty to do, or as the conductor has promised, does not justify a passenger in jumping off from it while moving, unless notified to do so by the carrier's agent, and the attempt is not obviously dangerous. — *BURGIN v. RICHMOND & D. R. CO.*, N. Car., 20 S. E. Rep. 473.

15. CARRIER—Passenger — Negligence.—Where there is evidence that plaintiff was induced to jump from the steps of defendant's train at night by the acts of defendant's servants, and in the belief that the train was at the depot platform, it is a question for the jury whether she was guilty of negligence in so jumping. — *LOUISVILLE, N. A. & C. RY. CO. v. HOLSAPPLE*, Ind., 38 N. E. Rep. 1107.

16. CARRIERS—Passengers.—Where a passenger after being warned by the conductor not to do so, entered a car standing at the usual place at a station, and open so as to receive passengers, and which was designed for the train on which he was about to leave, but which was not then coupled to said train, he was guilty of contributory negligence as to any injury sustained by him by reason of boarding said car. — *TILLET v. LYNCHBURG & D. R. CO.*, N. Car., 20 S. E. Rep. 480.

17. CARRIERS OF PASSENGERS—Street-Railway Company—Negligence.—It being the duty of a street railway company, before restarting its car, to see and know that no passenger is in the act of alighting, the fact that a car was stopped a reasonable length of time, or that the driver supposed the passengers had alighted, does not relieve it from liability for injuries to a passenger attempting to alight, caused by the starting of the car. — *ANDERSON v. CITIZENS' ST. R. CO.*, Ind., 38 N. E. Rep. 1109.

18. CERTIORARI.—The office of the common-law writ of *certiorari*, when issued to review the proceedings of such court, in order that the superior court may determine therefore whether the inferior court acted within its jurisdictional powers, or whether its procedure was essentially regular, and in accordance with the requirements of law. — *JACKSONVILLE, T. & K. W. RY. CO. v. BOY*, Fla., 16 South. Rep. 290.

19. CERTIORARI—Judgment.—An order of the county court setting aside an allowance of a claim against an estate, made at a preceding term, cannot be reviewed by *certiorari*, since the county court, exercising equi-

table powers in probate matters, has jurisdiction to make such order on proper showing. — *SCHLINK v. MAXTON*, Ill., 38 N. E. Rep. 1063.

20. CHATTEL MORTGAGE — Failure to Record.—The failure to file a chattel mortgage given by a debtor, and unaccompanied by a change of possession of the mortgaged property, renders the mortgage void as to then existing creditors, under Laws 1893, ch. 279, § 1, although they had no judgments against the mortgagor. — *STEPHENS v. PERRINE*, N. Y., 39 N. E. Rep. 11.

21. CHATTEL MORTGAGE—Replevin.—Rev. St. ch. 95, § 4, declares that a duly-recorded chattel mortgage shall be valid until maturity of the entire debt, provided such time shall not exceed two years unless, within thirty days next preceding the expiration of said two years, a certain affidavit shall be filed: Held, that a mortgage securing a debt due more than two years after the time of recording was valid when attacked before the time for filing the affidavit had arrived. — *KEELER v. ROBINSON & CO.*, Ill., 38 N. E. Rep. 1073.

22. CONSTITUTIONAL LAW — Special Acts.—The act of the general assembly entitled "An act requiring persons, associations and corporations owning or operating street cars, to provide for the well being of employees" (90 Ohio Laws, 220), is not in conflict with section 26, art. 2, of the constitution of this State, which provides that "all laws of a general nature shall have a uniform operation throughout the State." Neither is it in conflict with section 1 of the fourteenth amendment to the constitution of the United States. — *STATE v. NELSON*, Ohio, 39 N. E. Rep. 22.

23. CONSTITUTIONAL LAW—Special Law—Act 1891, p. 424, in so far as it provides for the salaries of the county treasurers of all the counties in the State except Shelby county, is in conflict with Const. art. 4, § 22, prohibiting local acts in relation to salaries, except so as to grade the compensation of officers in proportion to the population. — *STATE v. BOICE*, Ind., 39 N. E. Rep. 64.

24. CONSTITUTIONAL LAW—Special Legislation. — A statute allowing a certain compensation to certain county officers in all counties of a certain class is not local or special legislation. — *FARNUM v. WARNER*, Cal., 38 Pac. Rep. 421.

25. CONSTITUTIONAL LAW—Special Legislation.—Act March 9, 1891, fixing the fees for certain officers, is not a special law because it provides that it shall not affect persons elected to office before it takes effect. — *STATE v. KROST*, Ind., 39 N. E. Rep. 46.

26. CONTRACT.—A letter reading, "I am prepared to make the arrangements with you on the terms you name," in answer to a letter of proposal, does not constitute an unconditional acceptance. — *HAVENS v. AMERICAN FIRE INS. CO. OF PHILADELPHIA*, Ind., 39 N. E. Rep. 40.

27. CONTRACT—Contemporaneous Parol Agreement.—In an action on a note for the price of land it is a good defense that, pursuant to a contemporaneous oral agreement, defendant had delivered certain personal property to plaintiff, which plaintiff had accepted in full payment of the note. — *COLLINS v. STANFIELD*, Ind., 38 N. E. Rep. 1091.

28. CONTRACT OF SALE—Breach.—In suit on contract, for refusal of purchaser to receive cattle, in order to entitle vendor to recover, he must prove that he was able and willing to deliver, at the time and place agreed upon, the number of cattle agreed upon; that said cattle were of the kind and quality required by the contract; and the difference in the market value of the cattle described in the contract, if any, at the time and place of delivery, and the price agreed to be paid therefor. — *SWEETSER v. MELLICK*, Idaho, 38 Pac. Rep. 403.

29. CONTRACT—Parties.—Under Code Civ. Proc. § 369, the party in whose name a written contract is made, though partly for the benefit of another, may sue thereon without joining the latter. — *GRAHAM v. FRANK*, Cal., 38 Pac. Rep. 455.

30. **CONTRACT—Several Liability.**—A building contract, providing that the "undersigned stockholders are to be held responsible only for the individual amount subscribed by them," is the several, and not joint, contract of each subscriber.—*DAVIS & RANKIN BLDG. & MANUF'G CO. v. MCKINNEY, Ind.*, 38 N. E. Rep. 1093.

31. **CORPORATION—Illegal Preferences.**—Where an insolvent corporation executes a judgment note to one of its stockholders for a debt due partly to him and partly to two of its directors, a judgment entered thereon, under which all of the corporate assets are seized, is void as to the corporation's other creditors, as being given to hinder and delay them.—*ATWATER v. AMERICAN EXCH. NAT. BANK OF CHICAGO, Ill.*, 38 N. E. Rep. 1017.

32. **CORPORATION—Organization.**—While the existence of a corporation dates from the time of filing its charter, it cannot be regarded as a complete organization, authorized to transact business, when the subscription books of the corporation have not yet been opened, and no stock has been subscribed; nor can it be until a full and complete organization has been effected, in accordance with the requirements of the statute.—*NEMAH COAL & MIN. CO. v. SETTLE, Kan.*, 38 Pac. Rep. 483.

33. **CORPORATION—Preferred Stock.**—One who, in satisfaction of a claim against the company, received preferred stock, issued under St. 1885, ch. 349, authorizing the Lamson & Goodnow Manufacturing Company to issue preferred stock in payments of its indebtedness, is a stockholder, and not a creditor.—*FIELD v. LAMSON & GOODNOW MANUF'G CO., Mass.*, 38 N. E. Rep. 1126.

34. **CORPORATION—Stockholder—Voting by Proxy.**—Under Civ. Code, § 312, providing that stockholders of corporations may be represented at all corporate elections by proxies, a stockholder may choose any person to cast his vote, and a by-law providing that no proxy shall be voted by one not a stockholder is unreasonable and invalid.—*PEOPLE'S HOME SAV. BANK v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal.*, 38 Pac. Rep. 452.

35. **CORPORATION—Venue.**—An action against a corporation for personal injuries may be begun in the county where the injuries were received, though defendant's principal place of business is in another county.—*JAGER v. CALIFORNIA BRIDGE CO., Cal.*, 38 Pac. Rep. 413.

36. **COUNTY BOND—Extent of Liability.**—A county bond issued for a particular improvement is chargeable only against the fund collected for that improvement, and is not a charge against the general fund of the county.—*WALKER v. BOARD OF COM'RS OF MONROE COUNTY, Ind.*, 38 N. E. Rep. 1096.

37. **COURTS—Entering Order after Term.**—An order of court should not be entered *nunc pro tunc* years after it was said to have been made, when there is no written evidence that any such order was in fact made.—*TYNAN v. WEINHARD, Ill.*, 38 N. E. Rep. 1014.

38. **COURTS—Jurisdiction on Appeal.**—A suit to foreclose a mortgage in which there is a decree of foreclosure, a sale thereunder, and an order to surrender the premises to the purchaser, does not involve a "freehold," within the meaning of the statute regulating appeals.—*VAN METER v. THOMAS, Ill.*, 38 N. E. Rep. 1037.

39. **COVENANTS—Incumbrances.**—An incumbrance may be defined to be "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance."—*CLARK v. FISHER, Kan.*, 38 Pac. Rep. 493.

40. **CRIMINAL LAW—Codefendants.**—Where one is jointly indicted with another, and there is no severance, he cannot be compelled to testify for his codefendant.—*HOLMAN v. STATE, Miss.*, 16 South. Rep. 294.

41. **CRIMINAL LAW—Extortion.**—Where defendant threatened to accuse another of a crime, with intent to himself commit that of extortion, and succeeded in obtaining money from that other, the fact that such person was endeavoring to induce defendant to receive money, for the purpose of accusing him of extortion, and so could not have been moved by fear, will not prevent his conviction for an attempt at extortion.—*PEOPLE v. GARDNER, N. Y.*, 38 N. E. Rep. 1003.

42. **CRIMINAL LAW—Rape—Assault.**—Under an indictment for assault with intent to commit rape, defendant may be convicted of such offense, though the evidence shows his crime to have been rape.—*COMMONWEALTH v. CREADON, Mass.*, 38 N. E. Rep. 1119.

43. **CRIMINAL LAW—Testimony of Wife—Presumption of Coercion.**—As under Pub. St. ch. 169, § 18, providing that a wife shall not be compelled to be a witness on the trial of an indictment against her husband, a wife may refuse to testify in his behalf, there is no presumption that a wife who testified in favor of her husband on a criminal trial acted under his coercion in committing perjury.—*COMMONWEALTH v. MOORE, Mass.*, 38 N. E. Rep. 1120.

44. **CRIMINAL PRACTICE—Indictment.**—An indictment which contains in its caption the name of one county and in the body gives the name of another county as the residence of the accused, and charges that the crime was committed "at W, in said county," is defective in not stating the county in which the offense was committed.—*COMMONWEALTH v. WHEELER, Mass.*, 38 N. E. Rep. 1115.

45. **DEED—Constructive Notice.**—One who purchases a farm across which is a clearly defined railroad grade, who knows the name of the company that made the grade, and who could, by inquiry of its officers, have learned that it held an unrecorded deed for the strip of land covered by the grade, is chargeable with notice of such deed.—*CHICAGO & E. I. R. CO. v. WRIGHT, Ill.*, 38 N. E. Rep. 1062.

46. **DEED—Delivery.**—In a suit to set aside a deed made to the grantor's daughter and her infant children, a sister of such daughter testified that the grantor delivered the deed to her for the grantees just before his death. It appeared that the deed had been executed some time before, and had been kept by the grantor: Held, sufficient to establish a valid delivery.—*WINTERBOTTOM v. WILLIAMS, Ill.*, 38 N. E. Rep. 1050.

47. **DEED—Reservations.**—Where a grantor plats land, and disposes of the lots under a common form of deed, containing the condition that "no building except a dwelling house, to be exclusively used as a residence for a private family, shall ever be erected thereon," such restriction is for the benefit of, and enforceable by, each grantee.—*HOPKINS v. SMITH, Mass.*, 38 N. E. Rep. 1122.

48. **DEVISE—Death before Testator—Lapse.**—A residuary devise to two persons, by name, "their heirs and assigns," being a devise of one-half of the residue to each, lapses on the death of one of them before testator, as to his share.—*HORTON v. EARLE, Mass.*, 38 N. E. Rep. 1135.

49. **DIVORCE—Adultery.**—Evidence that defendant, at midnight, entered a house of assignation, was shortly afterwards seen in the parlor of the house, holding a woman on his lap, and remained in the house until the next morning, is sufficient proof of adultery, although contradicted by defendant and his witnesses.—*COOKE v. COOKE, Ill.*, 38 N. E. Rep. 1027.

50. **EJECTMENT—Consolidated Actions—Judgments.**—Plaintiffs brought four actions of ejectment against several persons, in which the complaints stated a joint cause of action against all the defendants, and prayed for joint relief; and defendants filed separate answers, each claiming a particular portion of the land, and disclaiming as to the residue, and alleging the holding of portions in common, and that there was a community of interest among them. The actions were consolidated by consent: Held, that it was not reversible error to render a joint judgment for posses-

sion, and separate judgments for damages against defendants.—*ANDREWS v. CARLILE*, Colo., 38 Pac. Rep. 455.

51. **ELECTION CONTEST**—Marking of Ballot.—The law requiring a voter to place a cross opposite the name of each candidate for whom he votes is mandatory.—*LAY v. PARSONS*, Cal., 38 Pac. Rep. 447.

52. **EMINENT DOMAIN**—Opening Streets.—Where a petition by a city to condemn land for a street, a judgment of condemnation has been duly entered, it cannot be objected, upon a supplemental petition to assess the cost upon the adjoining property, that the land taken was not private property, having been previously dedicated as a highway.—*NEWMAN v. CITY OF CHICAGO*, Ill., 38 N. E. Rep. 1053.

53. **EMINENT DOMAIN**—Elements of Damage.—Under St. 1891, ch. 252, providing for the payment of damages by a town taking private land and water rights, where defendant took certain water rights belonging to plaintiff, and laid pipes on his land, it was proper, in estimating the value of the land taken, to consider its value as a mill site, not only in connection with the water power which plaintiff then possessed, but also with reference to the right which he might acquire under Pub. St. ch. 190, to flood lands on the stream above his own by building a mill.—*FALES v. TOWNS OF EASTHAMPTON*, Mass., 38 N. E. Rep. 1129.

54. **EVIDENCE**—An application for a loan on real estate, signed in blank by the mortgagor, and delivered to an agent with the instruction to copy the statements contained in an application to another company, and which is afterwards so filled up by such agent, is an original instrument, and admissible in evidence without producing the application from which the statements were copied.—*FARMERS' STATE BANK OF ALTON v. PENNSYLVANIA INV. CO.*, Kan., 38 Pac. Rep. 477.

55. **EVIDENCE**—Judicial Notice—Executed by Governor.—A deed executed by the governor under the seal of State is admissible in evidence, although not acknowledged, since the courts take judicial notice of the seal of State.—*CHICAGO & A. R. CO. v. KEEGAN*, Ill., 39 N. E. Rep. 33.

56. **EXECUTION**—Exemptions—Householders.—A widower 72 years old, living with his adult son on land to which the father had title, but contributing nothing to the support of the son's family beyond a sum necessary for his own maintenance, is not a "householder having a family," within Code, § 1970, providing for homestead exemptions.—*POWERS v. SAMPLE*, Miss., 16 South. Rep. 293.

57. **EXTRADITION**—Indictment—Constitutionality.—The courts of a State from which a fugitive from justice is demanded on extradition do not deny to such person any rights secured to him by the constitution and laws of the United States by refusing to pass on the constitutionality of the statute of the demanding State under which the indictment against such person is sufficient.—*PEARCE v. STATE OF TEXAS*, U. S. S. C., 15 S. C. Rep. 116.

58. **FEDERAL COURTS**—Jurisdiction.—The Federal Courts have no jurisdiction of an indictment for an assault committed on a vessel on Lake Huron within the boundary of the State of Michigan, either under section 5346, Rev. St., or under Act of Cong. Sept. 4, 1890.—*UNITED STATES v. PETERSON*, U. S. D. C. (Wis.), 64 Fed. Rep. 145.

59. **FEDERAL COURTS**—Jurisdiction—National Banks.—Federal Courts have no jurisdiction of an action by a national bank on a note, where the record does not show diverse citizenship.—*DANAHY v. NATIONAL BANK OF DENISON*, U. S. S. C. of App., 64 Fed. Rep. 148.

60. **FRAUDULENT CONVEYANCES**—By Surety.—A contingent liability of a surety is sufficient to create the relation of creditor and debtor, within the meaning of the statute of frauds against the fraudulent alienation of property, and a pre-existing debt evidenced by a note repeatedly renewed by the same maker and surety continues said debt as originally made between

the maker and surety.—*REEL v. LIVINGSTON*, Fla., 16 South. Rep. 284.

61. **GIFT**—Deposit in Bank.—The fact that a father deposited money in a savings bank in the name of his son, and took out a book in the latter's name, does not conclusively show a gift of the money to the son.—*BOOTH v. BRISTOL COUNTY SAV. BANK*, Mass., 39 N. E. Rep. 1120.

62. **GUARANTY**—Construction.—Defendant assigned to plaintiff a mortgage for \$4,000, conditioned for the payment of interest and \$100 annually, and providing that the premises should be kept insured for the benefit of the mortgagee. At the time of the assignment, defendant guarantied "the payment of the mortgage according to its terms, until the same is reduced to \$3,000." Subsequently, the buildings were burned, and plaintiff applied the insurance money to the mortgage debt, reducing it to \$2,700: Held, that such reduction did not discharge defendant from liability under his guaranty.—*SMITH v. FERRIS*, N. Y., 39 N. E. Rep. 3.

63. **HABEAS CORPUS**—Attorney in Fact.—Where a petition in *habeas corpus* showed on its face that the suit was being prosecuted by the relator for the benefit of the father of the child whose body was demanded, it was error to dismiss the proceeding, for not being brought in the father's name.—*STATE v. GIROUX*, Mont., 38 Pac. Rep. 464.

64. **HIGHWAY**—Damages for Obstructions.—The willful obstruction of a public highway is an indictable offense, and a public nuisance, yet no individual can maintain a suit for any damage, inconvenience, or expense suffered by him by reason of such obstruction in common with the people of the community.—*JACKSONVILLE, ETC. RY. CO. v. THOMPSON*, Fla., 16 South. Rep. 282.

65. **INJUNCTION**—Supreme Court—Jurisdiction.—To warrant the Supreme Court in taking jurisdiction in an original proceeding by injunction, the case made by the complaint must not only show equitable ground for relief, but must disclose a question involving the rights or franchises of the State in its sovereign capacity; that is, public rights or interests, as contradistinguished from matters of private or individual concern.—*PEOPLE v. MCCLEES*, Colo., 38 Pac. Rep. 468.

66. **INSURANCE**—Action on Policy.—A policy of fire insurance which has been regularly issued, and has not expired, or been canceled, must, in the absence of a showing to the contrary, be treated as a valid and effective policy, upon which the assured is *prima facie* entitled to recover when the loss occurs and the requisite steps to establish it have been taken.—*MOODY v. INSURANCE CO.*, Ohio., 38 N. E. Rep. 1011.

67. **INSURANCE**—Agreement to Arbitrate.—Where two arbitrators, appointed by the insurer and the insured, under a written agreement, for the purpose of choosing a third, and together determining the amount of a fire loss, fail to agree on the third, through the unreasonable conduct and demands of the one appointed by the insurer—the latter adopting this means to indefinitely delay any adjustment—the agreement is terminated.—*BRADY v. NEW YORK BOWERY FIRE INS. CO.*, N. Car., 20 S. E. Rep. 477.

68. **INTOXICATING LIQUORS**—Holiday.—Act March 9, 1891, entitled, "An act to amend an act entitled, 'An act in relation to promissory notes, bonds, checks and bills of exchange and to designate the holidays to be observed in the presentment, acceptance and payment of the same,'" and providing that the 30th day of May, among others, shall be a legal holiday, constitutes it such only for the purposes of commercial paper, and does not make it a holiday within the meaning of Rev. St. 1891, § 2098 (Rev. St. 1894, § 2194), forbidding a sale of intoxicating liquors as a beverage on a legal holiday.—*STATE v. ATKINSON*, Ind., 39 N. E. Rep. 51.

69. **INTOXICATING LIQUORS**—Power of Woman to Sell.—Rev. St. 1894, § 7278 (Rev. St. 1891, § 5314), which provides that any male inhabitant over 21 years of age may, by giving proper notice, etc., obtain a license to sell intoxicating liquors, impliedly inhibits women

from obtaining such a license.—**WOODFORD V. HAMILTON, Ind.**, 39 N. E. Rep. 48.

70. **LANDLORD AND TENANT—Covenant to Repair.**—A covenant by a lessee to pay rent, and a covenant by the lessor to deliver the premises in good condition and repair, and to make the alterations and repairs required during the term by any law, are independent covenants.—**THOMSON HOUSTON ELECTRIC CO. OF NEW YORK V. DURANT LAND IMP. CO., N. Y.**, 39 N. E. Rep. 7.

71. **LANDLORD AND TENANT—Rent.**—In an action for rent accruing after the expiration of a lease, there was evidence that before such expiration the landlord agreed to reduce the rent if the tenant would remain, and it appeared that for two months after the lease expired the tenant continued to pay rent at the old rate: Held, that it was error to place the first circumstances before the jury, in the charge, without reference to the other.—**GOLDSBROUGH V. GABLE, Ill.**, 39 N. E. Rep. 1025.

72. **LEGISLATURE—Appropriation.**—Every legislative act making an appropriation, where the money appropriated is not actually in the treasury, should specify the revenue of the particular fiscal year out of which the appropriation is to be paid; but an act which does not definitely specify such revenue is not void, provided such revenue can, from the language and purposes of the act, be ascertained with reasonable certainty.—**GOODYKOONTZ V. PEOPLE, Colo.**, 38 Pac. Rep. 473.

73. **LIBEL—Imputation of Crime.**—A newspaper article, giving an account of a person's arrest, and stating that he has been guilty of infamous crimes, though published in good faith, is not privileged.—**REPUBLICAN PUB. CO. V. CONROY, Colo.**, 38 Pac. Rep. 423.

74. **LIBEL—Imputations of Unchastity.**—Words intended to convey and conveying to the minds of the hearers the meaning that an unmarried woman has had sexual intercourse are actionable.—**COSAND V. LEE, Ind.**, 38 N. E. Rep. 1099.

75. **LIFE INSURANCE POLICY—Evidence of Suicide.**—In an action on a life insurance policy, the burden is on defendant to show that the insured committed suicide.—**TRAVELERS' INS. CO. V. NITTEHOLSE, Ind.**, 38 N. E. Rep. 1110.

76. **MANDAMUS—Certificate of Nomination.**—Upon submission of objections to certificates of nomination, by board of deputy State supervisors, to State supervisor of elections, his decision thereon is final and the board of deputy State supervisors refusing to comply therewith may be compelled to do so by *mandamus*. And an answer stating that they have been enjoined by the court of common pleas, or a judge thereof, states no valid excuse for refusing to comply with the decision of the State supervisor. In such case the court of common pleas has no jurisdiction of the subject-matter, and its order of injunction is void.—**STATE V. MILLER, Ohio**, 39 N. E. Rep. 24.

77. **MANDAMUS TO OFFICER—Contracts.**—*Mandamus* will not lie to an officer to do only such ministerial duty as existed when application for *mandamus* was made, and will not lie to him to sign a contract in accordance with an advertisement for public work and a bid therefor, where, before the application, the work was readvertised, and the same person made a lower bid, under which he obtained a contract for the work.—**UNITED STATES INTERNATIONAL CONTRACTING CO. V. LAMONT, U. S. S. C.**, 15 S. C. Rep. 97.

78. **MARRIAGE—Consent and Cohabitation.**—On trial for seduction under promise of marriage, evidence that prior to a day which was set for the marriage, and while no marriage previous to such day was contemplated, defendant, without objection from plaintiff, introduced her as his wife, and subsequently registered her name as his wife, and occupied the same room with her, at a hotel, where the alleged offense was committed, does not show the "mutual assumption of marital rights, duties or obligations" which, in addition to consent, is necessary under Civ. Code, §

55, to constitute a valid marriage. **PEOPLE V. LEHMANN, Cal.**, 38 Pac. Rep. 422.

79. **MASTER AND SERVANT—Negligence.**—In the absence of knowledge on the part of an employee of danger in working with or near defective machinery, he is not chargeable with negligence for not abandoning the employment.—**BJORMAN V. FT. BRAGG REDWOOD CO., Cal.**, 38 Pac. Rep. 451.

80. **MEASURE OF DAMAGES—Liquidated Damages.**—A provision in a contract for building a mill, that the damages for delay in completing the mill within the time fixed shall be \$50 per day, and that such damages shall be deducted from the contract price as liquidated damages, will be treated as liquidated damages, and not as a penalty.—**HENNESSY V. METZGER, Ill.**, 38 N. E. Rep. 1058.

81. **MECHANIC'S LIEN—Excessive Claim.**—In an action to enforce a mechanic's lien, evidence that a statement of the claim filed with the register of deeds contained charges for hire labor at higher prices than plaintiff paid therefor, though to some extent explained by plaintiff's testimony, will support a finding that plaintiff willfully and knowingly claimed more than was due.—**WALLS V. DUCHARME, Mass.**, 38 N. E. Rep. 1114.

82. **MECHANIC'S LIEN—Subcontractor.**—Where a contractor makes an assignment for the benefit of creditors before the subcontractor has acquired a lien by service of notice on the owner, the assignee takes the estate free from any lien of the subcontractor on the amount due from the owner.—**RYERSON V. SMITH, Ill.**, 38 N. E. Rep. 1032.

83. **MECHANIC'S LIEN—Sufficiency of Statement.**—The fact that the total amount claimed to be due in the claim for a mechanic's lien filed with the county clerk does not tally with the difference between the totals of the itemized statements of debits and credits, on account of the omission of a credit therefrom, does not invalidate the lien.—**CHAMBERLIN V. HIBBARD, Oreg.**, 38 Pac. Rep. 437.

84. **MORTGAGE—Equitable Mortgage.**—Where a landowner agrees to give a mortgage on all his land, but by mistake of the scrivener a parcel is omitted, the agreement will be considered, against the mortgagor, an equitable mortgage, so as to entitle the mortgagee to include in a foreclosure the land omitted, without the necessity of a reformation of the mortgage.—**SPRAGUE V. COCHRAN, N. Y.**, 38 N. E. Rep. 1060.

85. **MORTGAGE—Foreclosure—Appointment of Receiver.**—A receiver will not be appointed in an action to foreclose a mortgage on land, where the only allegation upon which the application for the receiver is based is that the mortgaged premises have a certain rental value.—**SELLERS V. STOFFEL, Ind.**, 39 N. E. Rep. 52.

86. **MORTGAGE—Statute of Limitations.**—Where a mortgagor pays his mortgagee \$10 and gives his acceptance, for \$350, payable June 25th, "in compromise of all claims," and the mortgagee, at the request of the mortgagor, postpones sale under the mortgage until July 8th, and they stipulate that no further advertising shall be required, and that upon payment of the acceptance the mortgage should be canceled, such an agreement, being an express and unconditional promise to pay, takes the mortgage debt out of the operation of the statute of limitations.—**ROYSTER V. FARRELL, N. Car.**, 20 S. E. Rep. 475.

87. **MUNICIPAL CORPORATION—Contracts.**—Municipal corporations, invested with full power to control and regulate the use of their streets, do not exceed their powers in making, by ordinance, irrevocable contracts, not exclusive in character, for the use of such streets for purposes of public comfort and convenience.—**BALTIMORE TRUST & GUARANTEE CO. V. MAYOR, ETC., OF CITY OF BALTIMORE, U. S. C. C. (Md.)**, 64 Fed. Rep. 153.

88. **MUNICIPAL CORPORATION—Improvement—Contractors' Bond.**—Where a bond given for the faithful

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performance of a contract for public work recites that it is of "even date with the contract," the fact that it is dated one day earlier is not sufficient to prove, in an action to enjoin an assessment levied therefor, that the bond was in fact executed a day earlier than the contract.—*BYRNE V. LUNING CO.*, Cal., 38 Pac. Rep. 454.

89. MUNICIPAL — Local Improvement—Taxation.—Water and sewer pipes connecting all the buildings in a street with the main pipes constitute a local improvement, for which a special tax may be levied, even though the water mains with which the connections are made belong to a private corporation.—*PALMER V. CITY OF DANVILLE*, Ill., 38 N. E. Rep. 1067.

90. NAMES — Evidence.—A declaration by a person that certain words constitute his name is competent evidence to show that such is his name.—*COMMONWEALTH V. GAY*, Mass., 38 N. E. Rep. 1121.

91. NATIONAL BANKS — Indebtedness. — Under Rev. St. U. S. § 8202, providing that no national bank shall "be indebted or in any way liable to an amount exceeding the amount of its capital stock paid in except on" circulation, deposits, special funds, or declared dividends, a national bank is prohibited from contracting debts or liabilities, other than those within the four classes named, except to the extent of its paid-up, unimpaired capital stock; but, to that extent, there is an implied authority to become indebted upon any contract within the scope of its powers, no matter what may be the amount of its debt or liability upon demands within such four classes.—*WEBER V. SPOKANE NAT. BANK*, U. S. C. C. of App., 64 Fed. Rep. 208.

92. NEGLIGENCE — Fire.—One is not liable for fire caused by sparks from his chimney unless he was negligent in using a chimney of that height, in that locality, without spark arresters.—*PUEBLO LIGHT, HEAT & POWER CO. V. MCGINLEY*, Colo., 38 Pac. Rep. 425.

93. NEGLIGENCE—Gas Pipe in Highway.—A gas company contracted for the construction of a gas plant. The contractor sublet the contract for boring the gas wells. The subcontractor, after boring one well, laid pipe, which was furnished by the contractor, to get gas from the well to use in boring others. Part of the pipe so laid was taken up by the contractor, and the rest used in conducting gas to a town for the use of the company. Held that, though the plant had not been turned over to the company, it and both contractors were liable for injuries to others caused by the negligent manner in which the pipe was laid.—*LEBANON LIGHT, HEAT & POWER CO. V. LEAP, Ind.*, 39 N. E. Rep. 57.

94. NEGLIGENCE — Injuries to Child—Contributory Negligence.—Where the complaint in an action for injuries caused by an explosion of gas in defendant's street pipes alleged that plaintiff, prior to the injury, was a "strong, active, energetic boy of twelve years of age, in good health, and in full possession of all his faculties," and the evidence tended to support the allegation, it was error to charge that he was not guilty of contributory negligence if, at the time of the accident, he was a child of immature years, tempted by curiosity, and incapable of comprehending the danger of standing near the burning gas and touching or disturbing an exposed part of the pipe.—*LEBANON LIGHT, HEAT & POWER CO. V. GRIFFIN, Ind.*, 39 N. E. Rep. 62.

95. NEGOTIABLE NOTE.—Where the answer in a suit on a note does not state facts sufficient to constitute a plea of illegality or fraud in the inception or transfer thereof, the production of the notes by the plaintiff is *prima facie* evidence of his ownership thereof.—*TRIPLETT V. FOSTER*, N. Car., 20 S. E. Rep. 475.

96. PARTNERSHIP—Mortgage.—Where three men, who afterwards became copartners, buy land with their individual funds, each taking title to an undivided one-third interest, the fact that they afterwards use the land for firm purposes, and repair the improvements thereon at the firm expense, does not, in the absence of any express agreement to that effect, make the land

firm property.—*ROBINSON BANK V. MILLER*, Ill., 38 N. E. Rep. 1078.

97. PATENTS—Damages for Infringement.—An infringer cannot escape liability for actual profits made, on the ground that his superior skill and scientific methods in conducting the business enabled him to reap greater profits than others would have done by the infringement.—*LAWTHER V. HAMILTON*, U. S. C. C. (Wis.), 64 Fed. Rep. 221.

98. PLEADING — Contract of Married Woman.—The rule of the common law is that a married woman can not be sued at law on contracts made by her during coverture, and, express legislative authority being necessary in order to maintain such a suit against her, it is essential that the declaration allege the statutory facts showing her liability to be sued in the action.—*CRAWFORD V. FEDER*, Fla., 16 South. Rep. 287.

99. PLEADING — Official Bond.—Where an action against a city treasurer on his official bond alleges as a breach failure to pay certain money to a third person, as directed by the common council, a plea *puis darrein* continuance that alleges that since the commencement of the action the treasurer's successor has succeeded to the office, that the council has ordered him to pay said money to such successor, and that he has done so, constitutes a good defense, since such order amounts to a revocation of the former order.—*CITY OF EAST ST. LOUIS V. RENSCHAW*, Ill., 38 N. E. Rep. 1045.

100. PUBLIC LAND — Title by Patent—Limitations.—Limitations do not run against one entitled to the legal title to government land until the patent by which it is granted is issued to him.—*SOUTH END MIN. CO. V. TINSLEY*, Nev., 38 Pac. Rep. 401.

101. QUIETING TITLE—Rights of Tax Title Holder.—In an action to quiet title, where defendant claimed by tax deed dated June 14th, and plaintiff shows that the county treasurer had no authority to sell the land until the next day, defendant may show by the tax-sale record that the sale took place on June 15th, to show that there was a clerical mistake in the deed.—*KNOWLES V. MARTIN*, Colo., 38 Pac. Rep. 467.

102. RAILROAD COMPANIES — Accidents—Contributory Negligence.—Where deceased was killed at a crossing where his view of the approaching train was obstructed, and the engineer did not see him till he was 20 feet from the crossing, and the engine 60 feet from it, held, that the question of contributory negligence was for the jury.—*NORTHERN PAC. R. CO. V. AUSTIN* U. S. C. C. of App., 64 Fed. Rep. 211.

103. RAILROAD COMPANY — Contract between Street Railroads — Construction.—Plaintiff and defendant companies owned competing street railroads in the city of Brooklyn, extending to Coney Island. Plaintiff's line from C depot, at N avenue and Twentieth street, was a steam railroad. All the other lines were horse railroads. The companies agreed, in 1882, that defendant should run cars for 21 years over plaintiff's track from defendant's road at N avenue and Fifteenth street to C depot, and that, if defendant should use "steam as a motive power" from N avenue and Fifteenth street to Coney Island, either party could terminate the contract: Held, that the words "steam as a motive power" did not mean rapid transit, by whatever means accomplished, so as to entitle defendant to terminate the contract on the use by it of electricity as a motive power on its road from N avenue and Fifteenth street to Coney Island, or disentitle plaintiff to specific performance.—*PROSPECT PARK & C. I. R. CO. V. CONEY ISLAND & B. R. CO.*, N. Y., 39 N. E. Rep. 17.

104. RAILROAD COMPANY—Municipal Aid.—An act incorporating a railroad company gave power to towns incorporated, or to be incorporated, to subscribe to its stock. A subsequent act passed at the same session incorporated a certain town, enumerated its powers among which power to subscribe for railroad stock was not included, and repealed all acts inconsistent therewith: Held, that the town had power to subscribe for such stock, there being no inconsistency be-

tween the acts.—*HUTCHINSON v. SELF*, Ill., 39 N. E. Rep. 27.

105. **RAILROAD COMPANY — Powers.** — A corporation can exercise no power not granted to it by the legislature.—*GEORG v. NEVADA CENT. R. CO.*, Nev., 38 Pac. Rep. 441.

106. **RAILROAD COMPANY — Surface Water—Railroad Grade.**—Evidence that a railroad was in operation when plaintiff bought land adjoining the right of way, and that afterwards the grade was raised to prevent washouts, whereby plaintiff's land was flooded, tends to prove that the raising of the railroad grade was a substantial and material alteration of the road from the construction originally contemplated.—*CHICAGO & A. R. CO. v. HENNEBERRY*, Ill., 38 N. E. Rep. 1043.

107. **REPLEVIN—Action on Bond.**—Rev. St. ch. 119, § 26, which provides that, where the merits of the case have not been determined in replevin, the defendant may plead that fact, and his title to the property, in defense to an action on the replevin bond, applies, even though the merits were not determined because the court issuing the replevin writ had no jurisdiction.—*O'DONNELL v. COLBY*, Ill., 38 N. E. Rep. 1065.

108. **REPLEVIN — Order of Delivery.**—The right to maintain an action of replevin does not depend upon the taking out of an order of delivery at or after the commencement of the action.—*VARNER v. BOWLING*, Kan., 38 Pac. Rep. 481.

109. **REPLEVIN — Pleading.**—A complaint in replevin against a town which alleges that the property claimed was taken by the town marshal to satisfy a tax assessed against plaintiff, and which does not allege that the tax was illegal, is demurrable.—*TOWN OF ANDREWS v. SELLERS*, Ind., 38 N. E. Rep. 1101.

110. **REPLEVIN — Wrongful Detention—Damages.**—In an action of replevin, the measure of damages for the wrongful detention is ordinarily the interest on the value of the property while wrongfully detained; but, where the property has a usable value, the value of the use of the property while it is so detained is a proper measure of damages.—*WERNER v. GRALEY*, Kan., 38 Pac. Rep. 482.

111. **STATUTES—Enactment—Presumption.**—Where an act of a State legislature is attested by the speaker and chief clerk of the house and president and secretary of the senate, is indorsed "Approved" by the governor, bears a certificate of the chief clerk of the house "that the within act originated in the house of representatives, and passed the legislature" on a specified day, and is duly filed in the office of the secretary of State, the federal courts will regard the act as duly enacted, in the absence of some special provision of the constitution or decision of the Supreme Court of such State requiring the courts to look beyond such evidences, and determine the question of due enactment by reference to other evidence.—*AMES v. UNION PAC. RY. CO.*, U. S. C. C. (Neb.), 64 Fed. Rep. 165.

112. **TAXATION—Railroad Bridge.**—A bridge company leased its bridge to a railroad company forever, subject to condition of re-entry if the railroad company should fail to pay the rent or to keep its covenants in the lease: Held, that the bridge should be assessed by the township assessor as property of the bridge company, and not by the State board of equalization as railroad property, since the railroad company did not, by said lease, become the owner of the bridge.—*CHICAGO & A. R. CO. v. PEOPLE*, Ill., 38 N. E. Rep. 1075.

113. **TRIAL—Competency of Juror.**—In a prosecution for selling liquor to a minor, a juror is not rendered incompetent by answering in the affirmative the question: "Do you believe that a man engaged in the sale of intoxicating liquors under a license is a moral man?"—*PEMBERTON v. STATE*, Ind., 38 N. E. Rep. 1096.

114. **VENUE—Change.**—Const. art. 6, § 5, providing that an action to recover land must be "commenced" in the county where the land is situated, does not prohibit such a suit, after having been so commenced, from being removed to another county for trial.—*DUFFY v. DUFFY*, Cal., 38 Pac. Rep. 443.

115. **WATER COMPANY—Exclusive Franchise.**—A legislative grant in general terms to a corporation of a franchise to supply a city with water does not carry with it the exclusive right of so doing.—*IN RE CITY OF BROOKLYN*, N. Y., 38 N. E. Rep. 983.

116. **WATER IN STREAM—Appropriation.**—Where one owning land along a stream appropriates all the water of the stream to irrigate his land, and another landowner subsequently makes an appropriation of part of the water for the same purpose, the owner making the first appropriation cannot deprive the other owner of water from the stream by selling the same to supply the inhabitants of a city.—*CREEK v. BOZEMAN WATER WORKS CO.*, Mont., 38 Pac. Rep. 459.

117. **WATER — Prescriptive Right to Use.** — Where plaintiff, besides denying defendant's title to water used for irrigation, turned the water from defendant's trench, there was such an interruption of defendant's use of the water as to prevent him from acquiring title thereto by prescription, though defendant, when plaintiff left, turned the water into his trench again.—*AUTHERS v. BRYANT*, Nev., 38 Pac. Rep. 439.

118. **WATERS—Riparian Rights.**—A riparian owner cannot acquire title to land in his front, under the waters of a navigable river and below high water mark, by filing up and displacing the water with soil from his land.—*SAUNDERS v. NEW YORK CENT. & H. R. R. CO.*, N. Y., 38 N. E. Rep. 992.

119. **WILL—Devise to Widow.**—After devising six-sevenths of his real and personal estate to his children, decedent's will continued: "The other seventh I give and devise to my wife, to be disposed of as she shall think best;" but "any part of her said seventh" not disposed of at the time of her decease "shall be equally divided among my said six children. The devise and bequest made to my wife is made to her in lieu of dower and distributive share." Held, that the widow took the absolute property in said seventh.—*KNIGHT v. KNIGHT*, Mass., 38 N. E. Rep. 1131.

120. **EXECUTORY DEVISE.**—A testator devised land to his daughter, in language that carried the fee, and then declared: "Should the said [daughter] die leaving no heirs, I will direct that all of the above-described property shall be equally divided between my sisters." Held, that the devise to the sisters was a valid executory devise, dependent upon the daughter dying without issue surviving her.—*SMITH v. KIMBALL*, Ill., 38 N. E. Rep. 1029.

121. **WILL—Residuary Clause.**—After-acquired Property.—Testator, after giving certain legacies to some of his children, devised "all" of his land to other children, especially stating of what such land consisted. He then, after directing the payment of his debts out of the "balance of his property," provided that, "should there be anything left," it should go to the children to whom he had given the land: Held, that after-acquired land passed under the latter clause.—*WEBB v. ARCHIBALD*, Mo., 28 S. W. Rep. 80.

122. **WILL—Mistake as to Property Devised.**—Testatrix devised to one of her sons "the undivided one-half of all the lands of which I may die possessed, my land being in the N one-half of N E fractional one-fourth of section 35," etc. All of her land lay in section 36: Held, that the land in section 36 was devised.—*PRIEST v. LACKEY*, Ind., 39 N. E. Rep. 54.

123. **WILLS — Vested; Remainder.**—An illiterate testator, by holographic will, gave his wife certain land during widowhood, and on her death directed that it be sold, and the proceeds divided equally among his four sons named, "or" their heirs. If his widow married, he directed that the land be sold, and one-half the proceeds should be hers, to be used for her benefit and comfort during her life, and then "revert back" to his children, and that the other half of such proceeds should be equally divided among his children. The sons survived the testator: Held, that the fee of such real estate vested in the sons on testator's death.—*MILLER v. GILBERT*, N. Y., 38 N. E. Rep. 979.